

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7354

75-7354, 3032

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES O. FINLEY, SHIRLEY M. FINLEY and
CHARLES O. FINLEY & COMPANY, INC.,

Plaintiffs-Appellees,

—against—

PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT,
JESUP & LAMONT, JOHN J. DUNPHY and F.O.F. PROPRIETARY FUNDS, LIMITED,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
PURSUANT TO 28 U.S.C. § 1292(b)

PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT,
JESUP & LAMONT, JOHN J. DUNPHY and F.O.F. PROPRIETARY FUNDS, LIMITED,

Petitioners,

—against—

HONORABLE INZER B. WYATT, U.S.D.J.,

Respondent.

PETITION FOR WRIT OF MANDAMUS

APPENDIX

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P/S

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries
[Northern District of Illinois]

70 C 820

DATE	PROCEEDINGS
6- 4-70	Filed Notice
6- 4-70	Filed Answer of Jesup and Lamont and John J. Dunphy to complaint
6 -9-70	Filed Notice of Motion
6- 9-70	Filed Motion to extend time to answer or otherwise plead to complaint
6- 9-70	Time for defendants Delbert W. Coleman and William Scott to file a responsive pleading to the complaint be and is extended to and including June 16, 1970—Hoffman, J. Mailed notices 6-10-70
6- 9-70	Filed Notice of Motion
6- 9-70	Filed Motion of Plaintiffs
6- 9-70	Plaintiffs motion for an extension of time to file a memorandum in opposition to the motion of defendants John J. Dunphy and Jesup and Lamont to transfer pursuant to 28 USC 1404 (a) entered and continued to June 16, 1970 at 10:00 a.m.—Hoffman, J. Mailed notices 6-10-70
6-16-70	Filed Appearance of Jerome J. Londin one of the attorneys for defendant
6-16-70	Filed Affidavit rule 39
6-16-70	Filed Notice of Motion
6-16-70	Filed Motion

Docket Entries
[Northern District of Illinois]

DATE

PROCEEDINGS

- 6-16-70 ORDERED (1) defendants William Scott, Delbert W. Coleman and F.O.F. Proprietary Funds, Ltd. shall have to and including July 15, 1970 to join in the pending motion of defendants Jessup and Lamont and John J. Dunphy to transfer and to file memoranda in support thereof. Plaintiffs motion for an extension of time to file a memorandum in opposition to the motion of defendants John J. Dunphy and Jseup and Lamont to transfer pursuant to 28 USC 1404 (a). (2) Plaintiffs shall have to and including August 4, 1970 to file a response to the transfer motion and the memoranda filed in support thereof. (3) Defendants William Scott and Delbert W. Coleman shall have to and including August 4, 1970 to answer or otherwise plead to the complaint—DRAFT—Hoffman, J.
Mailed notices 6-18-70
- 6-16-70 Enter order authorizing Jerome J. London of the New York Bar to enter appearance on behalf of defendants Dumphy and Jesup and Lamont allowed—Hoffman, J.
Mailed notices 6-18-70
- 6-17-70 Preliminary pre-trial heard, cause to retain its place on the calendar—Hoffman, J.
Mailed notices 6-22-70
- 7- 2-70 Time for defendant F.O.F. Proprietary Funds Limited to file a reply memorandum to plaintiffs memorandum in answer to motion to transfer be and is extended (5 days) to and including August 10, 1970. Motion for said defendant for extension of time to answer or

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Docket Entries
[Northern District of Illinois]

DATE	PROCEEDINGS
	otherwise plead to the complaint denied— Hoffman, J. Mailed notices 7-6-70
7- 8-70	On Courts motion cause placed on call of cases holding place for trial Calendar No. 111— Hoffman, J. Mailed notices 7-8-70
7-13-70	Filed Notice
7-13-70	Filed Supplemental affidavit in support of mo- tion by Defendants John J. Dunphy and Jesup and Lamont to transfer
7-15-70	Filed Notice of filing and Motion of Defendant Parvin/Dohrmann Co. to Transfer
7-15-70	Filed Memorandum of Defendant Parvin/Dohr- mann Co. in support of Motion to Transfer
7-15-70	Filed Affidavit of Stephen C. Sandel and Ex- hibits
7-15-70	Filed Notice
7-15-70	Filed Supplemental Affidavit in support of mo- tion of defendants John J. Dunphy, and Jesup and Lamont to transfer pursuant to 28 USC 1404
7-15-70	Enter order for leave to file supplemental affi- davit in support of motion to transfer—Rob- son, J. Mailed notices 7-20-70
7-15-70	Filed Notice
7-15-70	Filed Motion of Delbert W. Coleman and William C. Scott to transfer this action to the Southern District of New York pursuant to 28 USC Sec. 1404

Docket Entries
[Northern District of Illinois]

DATE	PROCEEDINGS
7-15-70	Filed Memorandum of Delbert W. Coleman and William C. Scott in support of their Motion to transfer
7-15-70	Order leave to defendants D. W. Coleman and W. C. Scott to file instant motion to transfer and supporting memorandum with plaintiffs to respond by August 4, 1970—Robson, J. Mailed notices 7-20-70
8- 4-70	Filed Answer of Parvin/Dohrmann Co. Inc. to complaint
8- 4-70	Filed Answer of F.O.F. Proprietary Funds Limited to complaint
8- 5-70	Filed Memorandum of Plaintiffs in opposition to defendants motions to transfer this action pursuant to 28 USC 1404 (a)
8- 5-70	Filed Answer of William C. Scott
8- 5-70	Filed Answer of Delbert W. Coleman
8- 7-70	Filed Motion of F.O.F. Proprietary Funds Inc. to extend time
8- 7-70	Enter order motion of F.O.F. Proprietary Funds, Limited to extend time to reply to plaintiffs memorandum in opposition to defendants motions to transfer pursuant to 28 USC 1404 (a) to and including August 17, 1970 granted—Lynch, J. Mailed notices 8-7-70
8-17-70	Filed Reply memorandum of defendants Coleman and Scott in support of their motion to transfer this action pursuant to 28 United States Code 1404(a).

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Docket Entries
[Northern District of Illinois]

DATE	PROCEEDINGS
8-17-70	Filed Memorandum of defendant F.O.F. Proprietary funds, Limited in reply to Memorandum of plaintiffs in opposition to defendants motion to transfer pursuant to 28 U.S.C. 1404(a)
8-25-70	Motion of defendant to transfer this case to the Southern District of New York, allowed. 28 United States Code, Section 1404(a).—Hoffman, J. Mailed notices 8-27-70
8-25-70	Filed Memorandum of Decision

Docket Entries
[Southern District of New York]

70 Civ. 4306

DATE	PROCEEDINGS
Oct. 5—70	Filed papers originally filed in U.S.D.C. of Illinois, were this day filed, Complaint summons, Docket sheets, etc. Mailed Rules 3 & 4—Jury Demand by Pltff.
RECORD ON PROCEEDING SDNY.	
Nov. 5—70	Filed stipulation of substitution of attorneys. Olwine Connelly, Chase & O'Donnell & Weyher are substituted in place of McDermott, Will & Emery, as attys. for defendant Parvin/Cohrman Co.
Oct. 5—71	Filed Pltff's notice of appearance.
Oct. 5—71	Filed Pltff's notice to take deposition of Delbert W Coleman on 11-22-71, & requests for production of documents under Rule 34.
Oct. 5—71	Filed Pltffs notice to take deposition of Wm. C Scott on 11-29-71, & Requests for production of documents under Rule 34.
Oct. 5—71	Filed Pltffs notice to take deposition of Parvin/Dohrmann Co. Inc. now known as Recrion Corp. on 11-15-71, & Requests for production of documents under R. 34.
Oct. 29—71	Filed affdvt & stip of substitution of atty. for deft—So ordered—Gurfein, J.
Nov. 18—71	Filed stip & order that time for defts' Parvin/Dohrmann Co., Delbert Coleman & William Scott to respond to pltffs' request for production of documents is ext.

Docket Entries
[Southern District of New York]

DATE	PROCEEDINGS
	to 11-29-71; deposition of deft Recrion Corp. is adj. to 12-7-71; deposition of deft Delbert Coleman is adjourned to 12-14-71; deposition of Scott is adj. to 12-21-71—So ordered—Bonsal, J.
Jan. 7—72	Filed stip & order that deposition of deft Recrion Corp. is adj. to 1-12-72 & deposition of deft Coleman is adj. to 1-19-72 & deposition of deft Wm. Scott is adj. to 1-26-72—So ordered—Pierce, J.
Jan. 7—72	Filed stip & order that time for def 's Parvin/Dohrmann Co., Delbert Coleman & Wm. Scott to respond to plttfs' request for production of documents is extended to 1-10-72—So ordered—Pierce, J.
Jan. 19—72	Filed Stip & Order that the time within which defts Parvin/Dohrmann Co Inc., Delbert W Coleman and Wm. C Scott shall respond to plttf's request for production of documents Under Rule 34 is hereby ext. to Feb 15 1972. So Ordered—Weinfeld J.
Jan. 19—72	Filed Stip & Order that the deposition of deft Delbert Coleman is adj. to 2-22-72 that the deposition of Wm C Scott is adj. to 2-29-72 and that the deposition of Recrion Corp. is adj. to March 7 1972. So Ordered—Weinfeld J.
Feb. 28—72	Filed Stip & Order that deposition of D.W. Coleman is adj. to 4-5-72 and deposition of Wm. C. Scott and Recrion Corp. are adj. to 4-12-72 and 4-19-72 respectively. So. Ordered—Tenney J.

Docket Entries
[Southern District of New York]

DATE	PROCEEDINGS
Apr. 17—72	Filed stip & order that deposition of deft Coleman is adj. to 4-19-72 at same hr. & place; deposition of deft Scott is adj. to 4-26-72; deposition of Reerion Corp. is adj. to 5-3-72—So ordered—Motley, J.
Dec. 14—73	Filed stip. and order that the firm of Milgrim, Thomajan and Jacobs is substituted as attys. of record for the deft. FOF PROPRIETARY FUNDS, LTD. in place of Paul Weiss Rifkind Wharton and Garrison. So ordered, Stewart, J. (w/J)
Jan. 2—74	Filed stip. and order that Townley, Updike, Carter and Rodgers be substituted in place of Pollack, Singer for deft. Parvin Dohrmann Co., Inc. (now known as Reerion Corp.) So ordered, Stewart, J. (w/J)
Mar 19—75	Mailed notice of reassignment.
Apr. 3—75	PRE-TRIAL CONFERENCE HELD BY Schreiber
Apr. 18—75	PRE-TRIAL CONFERENCE HELD BY Schreiber
Apr. 25—75	Filed Pltffs. request for production of documents to deft. Jesup & Lamont.
Apr. 25—75	Filed Pltffs. request for production of documents to deft. John J. Dunphy.
Apr. 25—75	Filed Pltffs. request for production of documents to deft F.O.F. Proprietary Funds Ltd.
Apr. 25—75	Filed Pltffs. request for production of documents to deft. Parvin/Dohrmann Co, Inc.

Docket Entries
[*Southern District of New York*]

DATE	PROCEEDINGS
Apr. 25—75	Filed Pltffs. request for production of documents to deft. William C. Scott.
Apr. 25—75	Filed Pltffs. request for production of documents to deft. Delbert W. Coleman
Apr. 25—75	Filed Pltffs. Notice of Deposition of Delbert W. Coleman on 5/1/75.
Apr. 25—75	Filed Pltffs. Notice of Deposition of Parvin/Dohrmann & Co. Inc. on 5/6/75.
Apr. 25—75	Filed Pltffs. Notice of Deposition of Jesup & Lamont on 5/8/75.
Apr. 25—75	Filed Pltffs. Notice of Deposition of F.O.F. Proprietary Funds Ltd. on 5/9/75.
Apr. 25—75	Filed Pltffs. Notice of Deposition of John J. Dunphy on 5/7/75.
Apr. 25—75	Filed Pltffs. Notice of Deposition of William C. Scott on 5/5/75.
Apr. 29—75	Filed Defts. Memorandum of Law.
Apr. 29—75	Filed Defts. affidavit and notice of motion for an order to dismiss complaint. ret. 5/2/75.
May 5—75	Filed Memo. End. on motion dtd. 4/29/75. Motion denied. Wyatt J. (mailed notice)
May 5—75	Filed Affidavit in opposition to motion to dismiss by Martin I. Shelton.
May 6—75	Filed Pltffs. Notice to Produce to defts. Parvin/Dohrmann Co., Inc., Delbert W. Coleman & William C. Scott.
May 13—75	Filed Stip & Order that Rosenman Colin Kaye Petschek Freund & Emil & Jenner

Docket Entries
[Southern District of New York]

DATE	PROCEEDINGS
	& Block be substituted in place & stead of Townley, Updike Carter & Rodgers attys. for deft Parvin/Dohrmann Co., Inc. Wyatt J.
May 14—75	Filed Order that the 5/2/75 order denying defts. motion to dismiss is amended to include the said order involved a controlling question of Law, as indicated. Wyatt J.
May 22—75	Filed Affidavit of Personal Service by Edward T. Walsh on 5/1/75 Served John J. Dunphy.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 5/2/75 Served Paul A. Murphy.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 5/1/75 Served Allen & Co.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 4/30/75 Served Arthur Lipper Corp.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 5/1/75 Served Thompson McKinnon Auchlis & Kohlmeier Inc.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 5/1/75 Served Manhattan Fund.
May 22—75	Filed Affidavit of Personal Service by James P. Pettit on 4/30/75 Served Jesup & Lamont.
Jun 23—75	Filed appellants (Parvin/Dohrmann Co., et al) bond for costs on appeal \$250. Aetna.

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Complaint

APR 8 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELBERT A. WAGNER, JR.
CLERK

CHARLES O. FINLEY,
SHIRLEY M. FINLEY and
CHARLES O. FINLEY & COMPANY, INC.,

Plaintiffs,

vs.

PARVIN/DOHRMANN COMPANY, INC.,
DELBERT W. COLEMAN, WILLIAM C. SCOTT,
JESUP & LAMONT, JOHN J. DUNPHY and
F. O. F. PROPRIETARY FUNDS, LIMITED,

Defendants.

JUDGE HOFFMAN

700C

820

COMPLAINT

Plaintiffs, CHARLES O. FINLEY, SHIRLEY M. FINLEY
and CHARLES O. FINLEY & COMPANY, INC., by their attorneys,
complain of defendants as follows:

COUNT I

JURISDICTION AND VENUE

1. This action arises under Sections 5 and 12 of
the Securities Act of 1933, 15 U.S.C. §§77e and 771, and
Sections 9 and 10(b) of the Securities Exchange Act of 1934,
15 U.S.C. §§78i and 78j(b), and rules promulgated pursuant thereto.
The matter in controversy exceeds, exclusive of interest and

Complaint

costs, the sum of \$10,000.00. The jurisdiction of this Court is invoked under Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§77v and 78aa.

2. The action arises out of business transactions, including offers and sales, that took place within the Northern District of Illinois.

PLAINTIFFS

3. Charles O. Finley (hereinafter "Finley") is a resident of La Porte, Indiana, and is the President and Chief Executive Officer of Charles O. Finley & Company, Inc.

4. Shirley M. Finley (hereinafter "Mrs. Finley") is a resident of La Porte, Indiana.

5. Charles O. Finley & Company, Inc. (hereinafter "Finley Company") is an Illinois corporation with its principal office in Chicago, Illinois.

DEFENDANTS

6. Parvin/Dohrmann Company (hereinafter "Parvin/Dohrmann") is a Delaware corporation engaged in the business of selling hotel supplies, of operating hotels and casinos, of acquiring or attempting to acquire gambling casinos, and

Complaint

of promoting the sale and attempting to enhance the market value of its own securities. Parvin/Dohrmann transacts business, has agents, and may be found in the Northern District of Illinois. Parvin/Dohrmann is hereby made a defendant herein.

7. Delbert W. Coleman (hereinafter "Coleman") is the former Chairman of the Board of Directors and Chief Executive Officer of Parvin/Dohrmann. Coleman resides in Chicago, Illinois. Coleman is hereby made a defendant herein.

8. William C. Scott (hereinafter "Scott") is the President and Director of Parvin/Dohrmann. Scott maintains a residence in Las Vegas, Nevada. Scott participated in the business transactions, including the offers and sales, which took place in the Northern District of Illinois out of which this action arises. Scott is hereby made a defendant herein.

9. Jesup & Lamont (hereinafter "Jesup") is engaged in the business of buying and selling securities. Jesup is registered with the Securities and Exchange Commission, is a member of the New York Stock Exchange and the American Stock Exchange, and engages in transactions in securities which are not registered for trading on either of said Exchanges.

Complaint

Jesup participated in the business transactions, including the offers and sales, which took place in the Northern District of Illinois out of which this action arises. Jesup is hereby made a defendant herein.

10. John J. Dunphy (hereinafter "Dunphy") is a partner in Jesup and maintains a residence in Darien, Connecticut. Dunphy participated in the business transactions, including the offers and sales, which took place in the Northern District of Illinois out of which this action arises. Dunphy is hereby made a defendant herein.

11. F. O. F. Proprietary Funds Limited (hereinafter "F. O. F.") is a Canadian corporation with offices at 119 Rue de Lausanne, Geneva, Switzerland. F. O. F., directly or indirectly, is engaged in the business of operating gambling casinos and of buying and selling securities. F. O. F. participated in the business transactions, including the offers and sales, which took place in the Northern District of Illinois out of which this action arises. F. O. F. is hereby made a defendant herein.

PARVIN/DOHRMANN

12. The common stock of Parvin/Dohrmann is registered with the Securities and Exchange Commission pursuant to the

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Complaint

Securities Exchange Act, 15 U.S.C. §78 1, and is listed on the American Stock Exchange. During the year 1967 said stock traded at prices which ranged between \$12.25 and \$19.50 per share.

13. Prior to 1968 the principal business of Parvin/Dohrmann was the business of supplying food preparation and service equipment to hotels, restaurants and institutions.

14. The operation of gambling casinos, subject to certain restrictions and regulations, is and for many years has been lawful in the State of Nevada. Prior to 1967, however, few if any publicly owned corporations were engaged in the business of operating gambling casinos.

15. Effective as of a date on or before January 1, 1968, Parvin/Dohrmann acquired operating control of the Fremont Hotel and Casino in Las Vegas, Nevada.

16. In September, 1968, stockholders of Parvin/Dohrmann approved the acquisition, effective as of July 1, 1968, by Parvin/Dohrmann of operating control of the Alladin Hotel and Casino in Las Vegas, Nevada.

17. During the first nine months of 1968, largely as a result of the acquisition of operating control of the Fremont and Alladin Casinos, the market price of Parvin/Dohrmann

Complaint

stock increased from a price of \$15.00 per share to a price of about \$35.00 per share.

ACQUISITION OF PARVIN/DOHRMANN
SHARES BY DEFENDANTS

18. In or before October of 1968, defendant Coleman formed a group of associates to join with him in the purchase of 300,000 shares of Parvin/Dohrmann stock. On or before October 25, 1968, Coleman agreed to purchase said 300,000 shares at a price of \$35.00 per share. The delivery and payment for said shares was completed on or about January 13, 1969.

19. In connection with the transaction alleged in paragraph 18, defendant Scott was allocated 4,000 shares of Parvin/Dohrmann stock which he was permitted to acquire on credit. Continuously thereafter, Scott has been indebted to Coleman and has been a member of the group of associates of Coleman who, under the direction of Coleman, have managed and controlled Parvin/Dohrmann and performed the specific acts hereinafter alleged.

20. In connection with the transaction alleged in paragraph 18, Coleman purchased (for a price of \$300,000.00) all of the capital stock of Fremont Casino Corp., a Nevada

Complaint

corporation, which was licensed to operate the gambling casinos in the Fremont Hotel and the Alladin Hotel.

21. In or about October, 1968, defendant F. O. F. entered into an agreement with Coleman to purchase 81,000 shares of Parvin/Dohrmann stock. At the time of the execution of said agreement, F. O. F. and Coleman knew, or should have known, that F. O. F. could not own shares of a corporation engaged in the business of operating gambling casinos in Nevada and, therefore, that any shares of Parvin/Dohrmann purchased by F. O. F. would have to be promptly resold by F. O. F. F. O. F. purchased said shares with a view to their resale and was an underwriter within the meaning of Section 2(11) of the Securities Act of 1933. To facilitate the resale of said shares to the public, in October of 1968 Coleman agreed with F. O. F. that he would cause Parvin/Dohrmann to file a Registration Statement covering said shares.

SCHEME TO DEFRAUD

22. Commencing in or about October, 1968, the exact date being unknown to plaintiffs, defendants entered into an understanding, agreement or conspiracy to manipulate and enhance the market price of Parvin/Dohrmann stock by means of devices, schemes and artifices to defraud members of the

Complaint

investing public, including the making of untrue statements of material facts and the omissions to state material facts, and the engaging in acts and practices which would necessarily operate as a fraud and deceit upon persons considering the purchase or sale of Parvin/Dohrmann stock.

23. The terms of the aforesaid agreement included, inter alia, the following:

A. Defendants agreed to purchase for themselves and to cause others to purchase substantial amounts of Parvin/Dohrmann stock for the purpose of creating actual and apparent market activity in the stock which would thereby induce the purchase of Parvin/Dohrmann stock by others, restrict the floating supply of such shares on the market, and cause the market price of such shares to rise.

B. Defendants agreed to tout the shares of Parvin/Dohrmann to certain large institutional and other investors, and to make available to such large institutional and other investors certain non-public information concerning Parvin/Dohrmann, its business prospects, proposed acquisitions and mergers, in form not available to the general financial community and

Complaint

which did not comply with rules and regulations of the Securities and Exchange Commission applicable to the public offering of shares.

C. Defendants further agreed to make private and public statements to potential investors and stockholders which were designed to create the impression that Parvin/Dohrmann would be successful in the acquisition of control of additional operations which would materially enhance its earnings potential, without disclosing material facts which would have informed investors of difficulties and objections to such additional acquisitions.

D. Defendants agreed to publish and disseminate press releases which bullishly described the prospects for Parvin/Dohrmann notwithstanding the lack of a reasonable factual basis for such optimistic valuation of such shares.

E. Defendants agreed to conceal their scheme to manipulate and enhance the market price of Parvin/Dohrmann stock by filing false, misleading and inaccurate reports with the Securities and Exchange

Complaint

Commission and by issuing and disseminating false and misleading press releases.

ACTS IN FURTHERANCE OF THE CONSPIRACY
PRIOR TO MARCH 17, 196

24. In order to cause Parvin/Dohrmann stock to be purchased and sold at prices which were higher than would have prevailed in a free and open market in which the investing public was fully informed of all material facts about Parvin/Dohrmann, the defendants, and each of them, performed, or caused to be performed, the acts which they agreed to perform as hereinabove alleged. Among other acts which were intended by defendants to enhance artificially the price of Parvin/Dohrmann stock, and which had the effect intended by defendants, the defendants did the following:

A. Shortly after he entered into the agreement to purchase 300,000 shares as set forth in paragraph 18, defendant Coleman caused Enn Ess Realty Corporation, a corporation owned by Coleman and members of his family, to make over 30 separate purchases of Parvin/Dohrmann stock through brokers, at prices ranging from \$68.00 per share to \$85.00 per share. The smallest of said purchase transactions was for 100 shares and the largest was for 2,100 shares.

Complain

B. In connection with the transaction described in paragraph 18, defendants Coleman, Scott and Parvin/Dohrmann filed false and misleading reports with the Securities and Exchange Commission and the American Stock Exchange. Said reports concealed certain material facts, including the identity of certain of Coleman's associates and certain of the arrangements between Coleman and said persons.

C. On or about January 21, 1969, defendant Coleman certified that the information contained in a Schedule 13D, which he then filed with the Securities and Exchange Commission and the American Stock Exchange, was, to the best of his knowledge and belief, true, complete and correct. In fact, as defendant Coleman well knew, said statement unlawfully failed to disclose material facts with respect to the identity and background of associates of Coleman and the understandings and arrangements among said persons relating to Parvin/Dohrmann. The concealment of such facts was unlawful and contributed materially to the enhancement of the market price of Parvin/Dohrmann stock which took place subsequent to

Complaint

January 13, 1969, as hereinafter alleged.

D. Prior to January of 1969, defendants Scott and Coleman became aware of the fact that the prior management of Parvin/Dohrmann had made public statements inaccurately estimating the earnings of the company for the year 1968. At that time defendants Scott and Coleman well knew that proper accounting treatment of accounts receivable and certain other matters would require a reduction in 1968 earnings in the order of 4 or 5 million dollars and, therefore, result in a substantial net loss for 1968. Notwithstanding the knowledge of said facts, defendants decided to postpone disclosure of said information until a time at which the announcement of extraordinary charges for a prior year could be coupled with optimistic information about the prospects of the company. The purpose and effect of the concealment of such adverse information during the period between January and April of 1969 was to enhance the market price of Parvin/Dohrmann stock. The substance of the information thus concealed was required by law to be promptly disclosed as soon as it came to the attention of defendants.

Complaint

E. On or about January 27, 1969, defendants Scott and Coleman caused Parvin/Dohrmann to issue and disseminate a press release regarding the company's acquisition of the Stardust Hotel and Casino, which press release stated that the purchase price would be "\$15 million" but was false and misleading in that said press release failed to disclose the material fact that a \$500,000 finder's fee was paid to S. Korshak, a member of the Coleman "control" group and constituted an additional cost of the acquisition above the disclosed \$15 million purchase price. Defendants concealed said material fact because they well knew that its disclosure might adversely affect the market price of Parvin/Dohrmann stock.

F. In or about February and March of 1969, defendants Dunphy, Jesup, Coleman and Scott engaged in selective discussions with representatives of certain institutional investors, and provided them with selective information about Parvin/Dohrmann, on a confidential basis, for the purpose of inducing such institutional investors to purchase Parvin/Dohrmann stock. Such discussions were in part held in Las Vegas,

Complaint

Nevada, at the expense of Parvin/Dohrmann, and were planned in a manner which would moderate the effect of the adverse information being withheld from the public by estimating future earnings on the basis, in part, of the possible acquisition of the Riviera Hotel and Casino, and by misleading the representatives of such investors with regard to the character, reputation and identity of associates of Coleman. As a result of said discussions, institutional investors made large purchases of Parvin/Dohrmann stock, which purchases, as intended by defendants, had the effect of enhancing the price at which Parvin/Dohrmann shares were then and thereafter traded on the open market. The nature and extent of the direct discussions between defendants and the representatives of such institutional investors were concealed from the investing public. Well knowing that the statement was false and misleading, in March of 1969, defendant Scott stated to the public that the management of Parvin/Dohrmann "has not made any statements to any persons as to the company's financial prospects or financial future."

Complaint

G. On or about March 6, 1969, defendants Scott and Dunphy caused 5,700 shares of Parvin/Dohrmann stock held by the Parvin/Dohrmann Profit Sharing Trust to be purchased in "cross" transactions by three mutual fund clients of defendant Jesup.

H. On or about March 7, 1969, defendants Scott and Dunphy arranged for 20,000 shares of Parvin/Dohrmann stock held in the portfolio of the Albert Parvin Foundation to be purchased by two mutual fund clients of defendant Jesup in "cross" transactions.

I. In order to offset the possibly adverse effect on the price of Parvin/Dohrmann stock of the public distribution on March 17, 1969, of an article in a financial publication containing adverse comments respecting Parvin/Dohrmann, defendants Coleman, Jesup and Lamont executed purchases of approximately 18,000 shares of Parvin/Dohrmann stock, which purchases had the effect of arbitrarily enhancing the price of Parvin/Dohrmann stock.

25. During the period between January 13, 1969, and March 17, 1969, the price of Parvin/Dohrmann stock increased to more than \$90 per share.

*Complaint*PURCHASES BY PLAINTIFFS

26. Shortly before March 17, 1969, it came to plaintiffs' attention through the news media and other public information, including conversations with their broker, that certain large institutional investors were making purchases of Parvin/Dohrmann stock. In reliance on the information disseminated by defendants, and each of them, as alleged herein, and without the benefit of other material information which the defendants theretofore and thereafter concealed from the public, plaintiffs purchased shares of Parvin/Dohrmann stock as described below.

27. On March 17, 1969, plaintiffs Finley and Mrs. Finley placed an order to purchase 1,000 shares of Parvin/Dohrmann stock over the American Stock Exchange at a price of \$93.50 per share. Said transaction was consummated on March 24, 1969, for a gross price of \$93,983.50, including the broker's commission.

28. On April 1, 1969, plaintiff Finley Company placed an order for the purchase of 4,900 shares of Parvin/Dohrmann stock at a price of \$105.00 per share and an order for the purchase of 100 shares at a price of \$104.875 per share. On or about April 9, 1969, plaintiff Finley Company paid the gross

Complaint

price, including commission, of \$527,462.49 for said 5,000 shares.

29. On April 15, 1969, plaintiff Finley placed orders, through a broker, for 1,000 shares of Parvin/Dohrmann stock, 700 shares at a price of \$118.75 per share and 300 shares at a price of \$118.25 per share. On April 22, 1969, plaintiff paid the gross purchase price, including broker's commission, of \$119,108.65 for said 1,000 shares.

30. In early April, 1969, the Nevada Gaming Control Board took formal action which required defendant F. O. F. to sell its 81,000 shares of Parvin/Dohrmann stock.

31. Well knowing that defendant Coleman had undertaken to cause Parvin/Dohrmann to file a Registration Statement on Form S-1 under the Securities Act of 1933, as amended, covering the 81,000 shares of Parvin/Dohrmann stock owned by defendant F. O. F., and well knowing that no such Registration Statement had been filed, defendants Jesup, Dunphy, Scott and Coleman, on behalf of defendant F. O. F., made a public offering of said 81,000 shares to a selected group of prospective purchasers and brokers representing possible purchasers of said shares.

32. As a result of the public offering alleged in

Complaint

in paragraph 31, it came to the attention of plaintiffs and their broker that said 81,000 shares of Parvin/Dohrmann stock were available for purchase at a price of \$90.00 per share. At that time, as a result of the unlawful acts of defendants hereinabove alleged, Parvin/Dohrmann stock was trading on the American Stock Exchange at a price of approximately \$120.00 per share

33. In order to induce plaintiffs to purchase a substantial portion of said 81,000 shares for a price of \$90.00 per share, defendants, and each of them, directly or indirectly, represented to plaintiffs and others that they would cause Parvin/Dohrmann to file a Registration Statement under the Securities Act of 1933 relating to said shares, so as to permit the public sale thereof on or before August 1, 1969.

34. At the time said representation was made, defendants, and each of them, well knew that the filing of such a Registration Statement would require the disclosure of the material facts which had been theretofore concealed from the public, as well as other material facts which might adversely affect the market value of Parvin/Dohrmann stock, which they intended to be concealed from the public, and, therefore, each of said defendants had no intention of permitting

Complaint

the company to file a Registration Statement in compliance with applicable law.

35. In reliance on the aforesaid representation, and on the information about Parvin/Dohrmann which had been disclosed to the public, but in ignorance of material facts which had been unlawfully concealed from the public, plaintiff Finley, on April 23, 1969, placed an order with his broker for the purchase of 30,000 shares of F. O. F.'s public offering of 81,000 shares of Parvin/Dohrmann stock. On or about April 28, 1969, plaintiff Finley paid a gross purchase price, including the commission paid to his broker, of \$2,714,400.00 for said shares.

36. In connection with the purchase of 30,000 shares by plaintiff Finley, defendants Dunphy and Jesup, on behalf of defendant F. O. F., requested the customers of plaintiffs' broker to sign a letter agreeing that the Parvin/Dohrmann stock being acquired from F. O. F. would not be sold until the above described Registration Statement was filed or an unequivocal opinion of counsel to the effect that such a sale would not violate the Securities Act of 1933 was received.

37. Defendants arranged for the sale of the aforesaid 81,000 shares of Parvin/Dohrmann stock to plaintiff and

Complaint

others without filing a Registration Statement because they well knew that a lawful public offering of said stock, accompanied by the disclosure of all material facts about Parvin/Dohrmann as required by law, would have had a substantial adverse effect on the market price of Parvin/Dohrmann stock.

38. Defendant F. O. F. has been unjustly enriched by its unlawful purchase and resale of 81,000 shares of Parvin/Dohrmann stock.

RETENTION OF PARVIN/DOHRMANN STOCK
BY PLAINTIFFS

39. On April 24, 1969, the American Stock Exchange halted trading in securities of Parvin/Dohrmann. Trading in Parvin/Dohrmann securities was suspended until May 12, 1969.

40. During the suspension of trading alleged in paragraph 39, defendants performed the following acts pursuant to their conspiracy to manipulate the market price of Parvin/Dohrmann and to conceal material facts about Parvin/Dohrmann from the investing public:

A. In long distance telephone conversations with plaintiff Finley, defendant Scott stated that the management of Parvin/Dohrmann had nothing to hide, that the company was not guilty of violating any law,

Complaint

and that there was no need to be concerned about the company's future.

B. Defendant Scott executed and delivered to the Securities and Exchange Commission an affidavit which stated, in part, that Scott had "not at any time disclosed to any broker, dealer, investment company or investment adviser or anyone employed by any such person any material information respecting Parvin Dohrmann Company not previously disclosed to the public."

C. On May 5, 6, and 7, 1969, defendant Coleman, and others, sought to obtain a termination of the suspension of trading of Parvin/Dohrmann stock by means of a peremptory two paragraph press release (a copy of which is attached hereto as Exhibit A), which press release omitted any material information for Parvin/Dohrmann shareholders.

D. On or about May 8, 1969, defendants Coleman and Scott caused Parvin/Dohrmann to issue and disseminate a press release containing certain information regarding the activities of the Company and its

Complaint

officers, directors and related persons and including, among other things, information concerning the Stardust acquisition, the dissemination of which information was deemed necessary by the Securities and Exchange Commission prior to the lifting of the previously imposed trading suspension by the Commission against Parvin/Dohrmann stock. Such press release was false and misleading in that it stated that the Stardust was acquired "for a purchase price of \$15 million," but failed to disclose the existence or amount of the \$500,000 finder's fee paid to a member of the Coleman "control" group, in connection with such acquisition.

41. On or about May 15, 1969, defendant Coleman executed and filed with the Securities and Exchange Commission and the American Stock Exchange an "Amendment No. 1 to Schedule 13D" which was false and misleading in that it failed to state material facts about Parvin/Dohrmann required by law to be disclosed to the investing public.

42. On or about May 26, 1969, defendant Coleman issued a press release stating, in substance, that a price of \$141.00 per share fairly reflected the financial condition of Parvin/Dohrmann.

Complaint

43. In long distance telephone conversations during May and June of 1969, defendant Scott, in substance, advised plaintiff Finley that the fair value of Parvin/Dohrmann stock was substantially in excess of its current market price because there was every reason to believe (a) that Parvin/Dohrmann would be able to acquire the Riviera Casino and (b) that Parvin/Dohrmann would shortly be merged with Denny's Restaurants, Inc.

44. Defendant Scott knew, or should have known, in May and June of 1969, that neither the acquisition of the Riviera nor the merger with Denny's could be consummated without the consent of one Edward Torres; that the amount required to be paid to obtain such consent was in excess of \$13,000,000 in the form of a purchase price for over 88,000 shares of Parvin/Dohrmann stock held by Torres and certain associates of Torres; and that such price could not be paid to Torres without involving the company in further violations of law.

45. On June 4, 1969, defendant Coleman issued a public announcement to the effect that a merger between Denny's Restaurants, Inc. (hereinafter "Denny's") and Parvin/Dohrmann, based on an exchange ratio of 4 shares of Denny's

Complaint

for 1 share of Parvin/Dohrmann, was being negotiated.

46. On or about June 22, 1969, Edward Torres personally advised the President of Denny's that he would be required to buy the shares referred to in paragraph 44 for a price of \$150.00 per share.

47. In early July, 1969, defendants Coleman, Scott and Parvin/Dohrmann arranged for a bank to make an illegal loan of \$3,000,000 to the President of Denny's to enable him to pay the price required by Torres. The making of said loan and the participation by defendants in the arrangement therefor was unlawful.

48. In connection with the transaction between the President of Denny's and Torres, defendants Coleman and Scott agreed to a reduction in the proposed exchange ratio to 3-1/3 shares of Denny's for each Parvin/Dohrmann share. At no time did defendants, or any of them, explain the Torres transaction to the investing public or to plaintiffs.

49. During July and early August of 1969, in long distance telephone conversations with plaintiff Finley, defendant Scott, in substance, assured Finley that except for relatively minor matters, such as the terms of his own employment contract, there were no problems about the merger

Complaint

between Parvin/Dohrmann and Denny's; that the merger would provide Finley with registered shares which could be freely traded on the New York Stock Exchange and, therefore, he would not be prejudiced by Parvin/Dohrmann's failure to file a Registration Statement covering his shares as promised by defendants in connection with Finley's purchase in April; and that the fair value of Parvin/Dohrmann stock was in the \$150.00 to \$200.00 range.

.50. On or about August 20, 1969, defendants Coleman, Scott and Parvin/Dohrmann filed or caused to be filed, with the Securities and Exchange Commission and the American Stock Exchange an "Amendment No. 1" to its "Current Report for the Month of February, 1969, on Form 8-K," which Amendment No. 1 was false and misleading in that it omitted material facts required by law to be disclosed.

51. On or about October 10, 1969, the American Stock Exchange suspended trading in Parvin/Dohrmann stock.

52. On or about October 16, 1969, the Securities and Exchange Commission filed a complaint against the defendants in the United States District Court for the Southern District of New York.

53. Not until after the SEC complaint referred to

Complaint

in paragraph 52 had been filed did plaintiffs learn of the material facts hereinabove alleged which had theretofore been concealed by defendants.

54. Defendants failed or refused to perform their undertaking to plaintiff Finley to file a Registration Statement on Form S-1 with respect to 30,000 shares purchased by Finley in April, 1969, prior to the suspension of trading in Parvin/Dohrmann stock alleged in paragraph 51.

55. On January 16, 1970, plaintiffs offered to return to the defendants their shares of Parvin/Dohrmann stock and demanded the return to plaintiffs of the purchase price thereof, together with sales commissions, in the amount of \$3,454,954.64. The defendants, and each of them, refused to accept said tender.

56. On February 17, 1970, trading in Parvin/Dohrmann stock was permitted to be resumed. When trading resumed the price of the stock was \$37.25 per share.

57. Plaintiffs purchased and retained the Parvin/Dohrmann shares described above in reliance on the false and misleading statements of defendants as hereinabove alleged and in ignorance of the material facts unlawfully concealed by defendants.

Complaint

58. Plaintiffs have been injured in their business and property, by reason of the hereinabove alleged purchases, to the extent of over \$2,500,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray in the alternative:

1. That the Court enter an appropriate decree of rescission of plaintiffs' purchases, providing inter alia, that in exchange for a redelivery of plaintiffs' Parvin/Dohrmann shares defendants return to plaintiffs the price paid for such shares, together with interest thereon; or

2. That a joint and several judgment be entered against defendants and each of them for damages in the amount of \$2,500,000, or such larger amount as may be in accordance with law.

COUNT II

1. This action arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(b), and rules promulgated pursuant thereto. The jurisdiction of this Court is invoked under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

2-21. Plaintiffs repeat and reallege the allegations of paragraphs 2-21 of Count I of the Complaint.

Complaint

22. At all times alleged in this Complaint, plaintiffs were in the exercise of due care for themselves and their property.

23. Commencing in or about October, 1968, the exact date being unknown to plaintiffs, defendants embarked on a course of conduct which defendants knew, or in the exercise of reasonable care should have known, would mislead and deceive persons considering the purchase and sale of Parvin/Dohrmann stock with respect to the value of shares of such stock.

24. As a part of this course of conduct, defendants made, or caused to be made, statements of material facts to persons considering the purchase or sale of Parvin/Dohrmann stock, which statements defendants knew or, in the exercise of reasonable care, should have known to be materially misleading when made. Further, defendants omitted to state material facts to said persons, which facts defendants knew, or, in the exercise of reasonable care, should have known were necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading.

25. The aforesaid conduct of the defendants included

Complaint

the following acts which defendants, and each of them, knew or, in the exercise of due care, should have known would seriously mislead members of the investing public, including plaintiffs, with respect to the value of shares of Parvin/Dohrmann:

A. Defendant Coleman caused En- Ess Realty Corporation, a corporation owned by Coleman and members of his family, to make a series of purchases of Parvin/Dohrmann stock through brokers, which he knew, or should have known, would mislead the investing public with respect to the value of said shares.

B. Defendants Coleman, Scott and Parvin/Dohrmann filed misleading reports with the Securities and Exchange Commission and the American Stock Exchange.

C. Defendants made statements about Parvin/Dohrmann to certain large institutional and other investors, and made available to such large institutional and other investors certain non-public information concerning Parvin/Dohrmann, its business prospects, proposed acquisitions and mergers, in form not available to the general financial community and

Complaint

which did not comply with rules and regulations of the Securities and Exchange Commission applicable to the public offering of shares.

D. Defendants further made private and public statements to potential investors and stockholders which created the impression that Parvin/Dohrmann would be successful in the acquisition of control of additional operations which would materially enhance its earnings potential, without exercising due care to disclose all material facts which would have informed investors of difficulties and objections to such additional acquisitions.

E. Defendants published and disseminated press releases which bullishly described the prospects for Parvin/Dohrmann notwithstanding the lack of a reasonable factual basis for such optimistic valuation of such shares.

F. Defendants issued and disseminated press releases which they knew, or should have known, were misleading.

G. Defendants Scott, Coleman and Dunphy caused shares of Parvin/Dohrmann stock held by the Parvin/

Complaint

Dohrmann Profit Sharing Trust and by the Albert Parvin Foundation to be purchased in "cross" transactions by mutual fund clients of defendant Jesup, and executed purchases of approximately 18,000 additional shares of Parvin/Dohrmann stock when defendants knew, or should have known, that such cross transactions and purchases would have the effect of arbitrarily enhancing the price of Parvin/Dohrmann stock and misleading members of the investing public.

26-34. Plaintiffs repeat and reallege the allegations of paragraphs 25 through 33, inclusive, of Count I of the Complaint.

35. At the time the representation alleged in paragraph 33 of Count I was made, defendants, and each of them, well knew, or, in the exercise of due care should have known, that the filing of such a Registration Statement would require the disclosure of the material facts which, theretofore, had not been disclosed to the public, as well as other material facts which might adversely affect the market value of Parvin/Dohrmann stock, and, therefore, each of said

Complaint

defendants knew or, in the exercise of due care, should have known, that the Company would not be able to file a Registration Statement in compliance with applicable law.

36. Plaintiffs repeat and reallege the allegations of paragraph 35 of Count I of the Complaint.

37. Defendants knew, or in the exercise of due care, should have known, that the sale of the aforesaid 81,000 shares of Parvin/Dohrmann stock to plaintiffs and others without filing a Registration Statement, accompanied by the disclosure of all material facts about Parvin/Dohrmann, would mislead said purchasers and members of the investing public.

38. Plaintiffs repeat and reallege the allegations of paragraph 38 of Count I of the Complaint.

39-46. Plaintiffs repeat and reallege the allegations of paragraphs 51 through 58, inclusive, of Count I of the Complaint.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray in the alternative:

1. That the Court enter an appropriate decree of rescission of plaintiffs' purchases, providing inter alia, that in exchange for a redelivery of plaintiffs' Parvin/Dohrmann shares defendants return to plaintiffs the price

Complaint

paid for such shares, together with interest thereon; or

2. That a joint and several judgment be entered against the defendants and each of them for damages in the amount of \$2,500,000, or such larger amount as may be in accordance with law.

COUNT III

1. This action arises under Sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§77e and 771. The jurisdiction of this Court is invoked under Section 22 of said Act, 15 U.S.C. §77b.

2-11. Plaintiff Finley repeats and realleges the allegations of paragraphs 1, 2, 3, 6, 7, 11, 12, 17, 21, 25 and 30 of Count I of the Complaint.

12. In April of 1969 no Registration Statement was in effect as to the 81,000 shares of Parvin/Dohrmann stock owned by defendant F. O. F.

13. In April, 1969, defendant F. O. F. made a public offering of its 81,000 shares of Parvin/Dohrmann stock to a selected group of prospective purchasers and brokers representing possible purchasers of said shares.

14. As a result of the public offering alleged in paragraph 13 of this Count, it came to the attention of

Complaint

plaintiff Finley that said shares were available for purchase at a price of \$90.00 per share.

15. On April 23, 1969, plaintiff Finley placed an order with his broker for the purchase of 30,000 shares of F. O. F.'s public offering of 81,000 shares of Parvin/Dohrmann stock. On or about April 28, 1969, plaintiff Finley paid a gross purchase price, including the commission paid to his broker, of \$2,714,400.00 for said shares.

16. The proceeds of said sale, less commissions, were in due course remitted to and received by defendant F. O. F.

17. Defendant F. O. F., directly or indirectly, made use of various means and instruments of transportation and communication in interstate commerce, and of the mails, in connection with the sale and delivery of 30,000 shares of Parvin/Dohrmann stock to plaintiff Finley.

18. Plaintiff Finley repeats and realleges the allegations of paragraph 38 of Count I of the complaint.

19. Plaintiff Finley hereby tenders to defendant F. O. F. the 30,000 shares of Parvin/Dohrmann stock purchased by Finley from F. O. F., and demands a recovery of the consideration paid for such securities, with interest thereon.

Complaint

20. Plaintiff Finley has received no income from said security, but, on the contrary, has incurred costs and expenses by reason of his ownership thereof.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Finley prays that the Court enter judgment against defendant F. O. F. awarding plaintiff the relief authorized by Section 12 of the Securities Act of 1933, 15 U.S.C. §77 l.

COUNT IV

1. This action arises under Sections 9(a)(2) and 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78i. The jurisdiction of this Court is invoked under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

2-12. Plaintiffs repeat and reallege the allegations of paragraphs 2 through 10, inclusive, 12, and 17 of Count I of the Complaint.

13. Commencing in or about October, 1968, and thereafter, defendants effected various transactions in Parvin/Dohrmann stock, creating actual or apparent active trading in such security, for the purpose of inducing the purchase of such security by others, and with the purpose and

Complaint

effect of raising the price of such security, including the following acts:

A. Defendant Coleman caused Enn Ess Realty Corporation, a corporation owned by Coleman and members of his family, to make over 30 separate purchases of Parvin/Dohrmann stock through brokers, at prices ranging from \$68.00 per share to \$85.00 per share. The smallest of said purchase transactions was for 100 shares and the largest was for 2,200 shares.

B. On or about March 6, 1969, defendants Scott and Dunphy caused 5,700 shares of Parvin/Dohrmann stock held by the Parvin/Dohrmann Profit Sharing Trust to be purchased in "cross" transactions by three mutual fund clients of defendant Jesup.

C. On or about March 7, 1969, defendants Scott and Dunphy arranged for 20,000 shares of Parvin/Dohrmann stock held in the portfolio of the Albert Parvin Foundation to be purchased by two mutual fund clients of defendant Jesup in "cross" transactions.

Complaint

D. In order to offset the possibly adverse effect on the price of Parvin/Dohrmann stock of the public distribution on March 17, 1969, of an article in a financial publication containing adverse comments respecting Parvin/Dohrmann, defendants Coleman, Jesup and Lamont executed purchases of approximately 18,000 shares of Parvin/Dohrmann stock, which purchases had the effect of arbitrarily enhancing the price of Parvin/Dohrmann stock.

14-24. Plaintiffs repeat and reallege the allegations of paragraphs 25 through 35, inclusive, of Count I of the Complaint.

25. The prices paid by plaintiffs for shares of Parvin/Dohrmann stock as hereinabove alleged were affected by the acts of defendants alleged in this Count.

26. Plaintiffs did not discover any of the facts constituting the violation alleged in this Count prior to May 8, 1969, nor did plaintiffs discover the purpose or effect of any of said acts prior to the filing of the Complaint by the Securities and Exchange Commission alleged in paragraph 52 of Count I of this Complaint.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court enter a joint and several judgment against defendants awarding the relief authorized by Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78i(e), including the assessment of reasonable costs as provided therein.

COUNT V

1. This action arises under the common law of the State of Illinois. The jurisdiction of this Court is invoked under its power to determine matters which are ancillary to the Federal claims asserted in Counts I through IV of this Complaint.

2-21. Plaintiffs repeat and reallege the allegations of paragraphs 2 through 21, inclusive, of Count I of the Complaint.

22. Defendant F. O. F. paid a price of \$35.00 per share for its 81,000 shares of Parvin/Dohrmann stock.

23. On information and belief, plaintiffs allege that in connection with its purchase of Parvin/Dohrmann stock, F. O. F. falsely represented that it was purchasing such shares for investment, whereas in truth and in fact

Complaint

F. O. F. knew, or should have known, that it would be required promptly to resell said shares and that its purchase was in the nature of a wagering contract. In making such purchase, F. O. F. was, in substance, gambling that the defendants could enhance the price of Parvin/Dohrmann before F. O. F. would be required to divest itself of its shares.

24. Commencing in or about October, 1968, the exact date being unknown to plaintiffs, defendants, and each of them, committed unlawful acts, including the making of untrue statements of material facts, and the omission to state material facts, in order to defraud and deceive members of the investing public, including plaintiffs, for the purpose of inducing them to purchase Parvin/Dohrmann stock.

25-41. Plaintiffs repeat and reallege the allegations of paragraphs 24 through 38, inclusive, 57 and 58 of Count I of the Complaint.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray in the alternative:

Complaint

1. That the Court enter an appropriate decree of rescission of plaintiffs' purchases, providing inter alia, that in exchange for a redelivery of plaintiffs' Parvin/Dohrmann shares defendants return to plaintiffs the price paid for such shares, together with interest thereon; or

2. That the Court enter an appropriate decree of restitution, providing inter alia, that in exchange for a redelivery of plaintiff Finley's 30,000 shares of Parvin/Dohrmann stock purchased from defendant F. O. F., defendant F. O. F. be required to restore to Finley the proceeds of its unjust enrichment resulting from its unlawful acquisition and disposition of said shares; or

3. That a joint and several judgment be entered against defendants and each of them for damages in the amount of \$2,500,000, or such larger amount as may be in accordance with law; and

4. That the Court grant such further and additional relief as the Court may deem meet.

ROTHSCHILD, STEVENS,
BARRY & MYERS
105 S. LaSalle Street
Chicago, Illinois 60603
FR.2-2345

JOHN PAUL STEVENS,
NORMAN J. BARRY,
WILLIAM G. MYERS,
ALAN L. UNIKES,
Attorneys for Plaintiffs,

By 

A-51

JURY DEMAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES O. FINLEY,
SHIRLEY M. FINLEY, and
CHARLES O. FINLEY & COMPANY, INC.,

Plaintiffs,

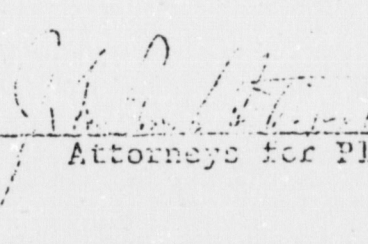
vs.

PARVIN/DOHRMANN COMPANY, INC.,
DELBERT W. COLEMAN, WILLIAM C. SCOTT,
JESUP & LAMONT, JOHN J. DUNPHY, and
F. O. F. PROPRIETARY FUNDS, LIMITED,

Defendants.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.


Attorneys for Plaintiffs

ROTHSCHILD, STEVENS, BARRY & MYERS
105 South LaSalle Street
Chicago, Illinois 60603
FRanklin 2-2345

EXHIBIT A

William C. Scott, President of Parvin/Dohrmann Company, announced that Company officials and counsel had met with the Securities and Exchange Commission today and were informed that the Order of Suspension will be terminated prior to the opening of trading on May 8, 1969, and that the investigation of the Commission will continue as previously announced.

The Company and its officers and counsel are assisting the Commission and the American Stock Exchange in every way possible in order to insure a fair and orderly market for trading in Parvin/Dohrmann stock and are furnishing the Commission with the information that will enable it to complete its investigation. The company ^{has} ~~will~~ agree to make a release of such information to the extent deemed advisable by the Commission.

**Transcript of Hearing Before Magistrate Sol Schreiber,
April 18, 1975**

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 CHARLES O. FINLEY, etc. :

6 Plaintiffs, :

7 -against- : 70 Civ. 4206

8 PARVIN/DOHRMANN COMPANY, INC., :
9 etc.

10 Defendants.

11 -----x

12 April 18, 1975
11:45 a.m.

13 Hearing before Magistrate Sol Schreiber,
14 held at the Chambers of the United States
15 Magistrate, United States Courthouse, Foley
16 Square, New York, New York, at the above
17 noted time and date.

18

19

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23

24

25

1 JRRP

2

2 APPEARANCES:

3 SHEA, GOULD, CLIMENKO, KRAMER & CASEY, ESQS.,
Attorneys for Plaintiffs,
4 BY: DANIEL L. CARROLL, ESQ.,
Of Counsel.

5
6 TOWNLEY, UPDIKE, CARTER & RODGERS, ESQS.,
Attorneys for Defendants Parvin/Dohrmann,
Coleman & Scott,
7 BY: RICHARD J. BARNES, ESQ.,
JAMES K. LEADER, ESQ.,
8 Of Counsel.

9 CARRO, SPANBOCK & LONDIN, ESQS.,
Attorneys for Defendant Dunphy,
10 BY: R. L. DUFF, ESQ.,
Of Counsel.

11
12 MILGRIM, THOMAJAN & JACOBS, ESQS.,
Attorneys for FOF Proprietary Funds, Limited,
13 BY: ROBERT A. MEISTER, ESQ.,
Of Counsel.

14

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15

16 THE MAGISTRATE: Gentlemen, I have requested
17 this hearing in the case of Finley versus Dohrmann
18 et al., because I am somewhat confused as to recent
19 developments.

20 This case has been very recently assigned
21 to Judge Wyatt who has referred it to me for all
22 pretrial purposes. Notice was given to counsel and
23 a meeting was held before me on April 3rd. At that
24 time, counsel had indicated that there was very little
25 activity in this case to date and that I had

1 jbrf

2 explained that this case was to be tried sometime
3 between May and July by Judge Wyatt and he had re-
4 quested me to get it ready for trial and had indicated
5 at best very limited discovery, if all discovery had
6 not been completed.

7 With that in mind I made certain directions
8 concerning what discovery can take place and since
9 then I've received two letters which are somewhat
10 puzzling. I also indicated that the attorneys were
11 to submit to me an order setting forth the schedule and
12 as yet I have not received that order.

13 Correspondence I have received is a letter
14 from Mr. Meister dated April 4th and a letter from Mr.
15 Barnes dated April 15th.

16 Let me take up the problems in order.

17 MR. CARROLL: I am Daniel Carroll. I wrote
18 to you in response to Mr. Meister's letter.

19 THE MAGISTRATE: I think you did but I don't
20 see that letter at this moment. But I'll take that
21 up after I take up the matters in sequence.

22 What happened to the pretrial order that I
23 directed be submitted to me on notice setting forth
24 the time schedule for all the limited discovery.

25 MR. MEISTER: Your Honor, I was the one

1 jbrf

2 to whom you gave that direction and I believe the
3 subject is explained somewhat in my letter but perhaps
4 I should explain it and refresh your Honor's
5 recollection a bit.

6 We were here and your Honor noted and
7 counsel confirmed that in the more than five years that
8 this case has been pending there has not been a
9 single deposition taken, there have been no interroga-
10 tories served, no production of documents.

11 At one point plaintiff had served notice
12 and those were adjourned sine die. Your Honor informed
13 us that the case had been referred to yourself as
14 Magistrate by Judge Wyatt with the express direction
15 that there be no discovery and no motions.

16 Your Honor commented at the time that the
17 plaintiff seemed lucky that no one had made a motion
18 to dismiss for lack of prosecution or that the Court
19 had not on its own motion dismissed the case for
20 lack of prosecution in light of the five years of
21 inactivity.

22 There was some discussion initially about
23 discovery and your Honor ruled that there be none
24 and at the end of the conference I explained what I
2 thought was the unique position of my client, the

1 jbrf
2 FOF Proprietary Fund, in that they are now, always
3 were, a wholly owned subsidiary of Fund of Funds Limited
4 which is in liquidation, having been looted by Mr.
5 Vesco and his friends. There is no management any
6 more other than the FOF liquidator and one of his
7 colleagues. All prior management was hostile and I
8 thought that your Honor might, under the circumstances,
9 rule that this unique situation presented special
10 circumstances which would allow us to take discovery.

11 Your Honor pointed out that if that were to
12 be the case then plaintiff and everybody else ought
13 to have discovery --

14 THE MAGISTRATE: Gentlemen, that may have
15 been the impression I left you but it does seem to me
16 that the defendants are as negligent in not bringing
17 on a motion to dismiss as the plaintiff is negligent
18 in not pursuing its discovery in the usual fashion.

19 MR. MEISTER: Except for the circumstances,
20 your Honor --

21 THE MAGISTRATE: Hold on and let me finish.
22 I know it is the custom in the metropolitan area
23 for the defendants to do nothing when the plaintiff
24 is doing nothing but it seems to me that if you want
25 the Court to recognize a motion to dismiss you don't

1 jbrf

2 wait until the case has been called and the Court
3 takes under consideration the question as to discovery.

4 Mr. Carroll, it seemed to me that I was under
5 the impression I had left you with the impression
6 at that time that if you wanted discovery you had to
7 make a motion before the Judge and now you go ahead
8 and serve matters.

9 Is the Magistrates word totally disregarded?

10 MR. CARROLL: I don't think I disregarded
11 your word. I think in the context of what happened
12 at the pretrial conference you originally started with
13 the proposition that there was to be no discovery.

14 THE MAGISTRATE: Certainly in a case as bad
15 as this one, as far as the handling of it with respect
16 to discovery, what has been the basis for the
17 inactivity over the past three years in discovery
18 by the client.

19 MR. MEISTER: Five years, your Honor.

20 THE MAGISTRATE: Five years.

21 MR. CARROLL: I don't believe it is five years

22 THE MAGISTRATE: Four years. Shall I get
23 the docket sheet out?

24 MR. MEISTER: It was filed in April of
25 1970 in Illinois.

1 jbrf

Colloquy

7

2 THE MAGISTRATE: Except for the notices,
3 there was a notice to take a deposition of Scott and
4 request for production of documents in October of
5 '71.

6 Who is representing Scott?

7 MR. BARNES: I am.

8 THE MAGISTRATE: Was there this deposition?

9 MR. BARNES: There were not, your Honor.

10 Plaintiffs' counsel abandoned any attempt to take
11 the depositions. With respect to the Rule 34 document
12 request we made available in late '71, early '72 to
13 plaintiffs' counsel all of the documentation that
14 we had, including all of the documentation that had
15 been generated by the SLC proceeding that gave rise
16 to this suit.

17 I would also point out to your Honor that the
18 Rule 34 document request that has been served on Mr.
19 Coleman and Mr. Scott just the other day appeared.
20 In my letter I say it is virtually identical. It
21 is in fact identical. It almost appears to have
22 been run off by a MTST machine.

23 THE MAGISTRATE: Well, you already responded
24 to that under the 1971 discovery, did you not?

25 MR. BARNES: Yes, we did.

1 jbrf

2 MR. CARROLL: I would like to say
3 something.

4 THE MAGISTRATE: Before you do that, let
5 the record note that the Magistrate has before him
6 the docket sheet of this case that indicate that except
7 for six matters recorded in late October or November
8 of '71 which are matters which indicate requests
9 and then stipulations adjourning, and six matters
10 in 1972 which appear to be stipulations and orders
11 extending the time to perform certain activities,
12 there has been nothing filed in this court indicating
13 interrogatories served, responded to, depositions
14 taken.

15 Now before you respond to anything, Mr.
16 Carroll, tell me why since 1971 you have not or your
17 office has not conducted any discovery in this case.

18 MR. CARROLL: Okay. In late '71, when we
19 first got the case after it had been transferred
20 from Illinois, we prepared document requests and
21 deposition notices that were served on three defendants--
22 Parvin/Dohrmann and Scott and Coleman.

23 Following the service of those documents
24 there were a number of adjournments. I had discussions
25 with, I believe, Mr. Daniels and I believe Mr. Barnes
at Townley, Updike, at that time.

1 jbrf

2 There were discussions about adjourning
3 the depositions first for no real reason other than
4 the fact that they were just noticed and then adjourning
5 the time for the documents --

6 THE MAGISTRATE: But in April of '72
7 everything stopped on the documents.

8 MR. CARROLL: Subsequently an arrangement
9 was reached as the 1. part of responding to these
10 document requests, the Townley, Updike firm would
11 produce on behalf of Mrs. Coleman and Scott
12 and Parvin/Dohrmann the documents that had theretofore
13 been produced before the SEC.

14 THE MAGISTRATE: When were they produced?

15 MR. CARROLL: This I believe happened in early
16 or mid-1972.

17 THE MAGISTRATE: Okay. What happened after
18 that?

19 MR. CARROLL: The depositions, meanwhile
20 of Mr. Coleman and Mr. Scott and Parvin/Dohrmann
21 were adjourned a number of times.

22 THE MAGISTRATE: In fact they were adjourned
23 so many times that you gentlemen even stopped filing
24 stipulations.

25 MR. CARROLL: That is correct and they were

1 jbrf

2 only adjourned for 30 days or so at a time.

3 We fully intended to take the depositions.

4 THE MAGISTRATE: But in May of '72 you gave
5 up. In May of '72 --

6 MR. CARROLL: At that time, as I recall,
7 and I believe this is accurate, at that time there
8 was discussions or we were informed of settlement
9 discussions up in Canada--

10 THE MAGISTRATE: Counsel, but that is three
11 years ago. If you want me to make a bloody record
12 of what the inaction of this case has been, I'll be
13 happy to do it. Three years ago there was some
14 discussions of settlement and since then nothing has
15 happened in this case.

16 Three solid years of inactivity.

17 MR. CARROLL: I am not denying that. I am
18 responding to your question asking me why things
19 happened like that.

20 THE MAGISTRATE: But after it looked like
21 settlement was not going to take place, why didn't
22 somebody start discovery again?

23 MR. CARROLL: We were in contact with Mr.
24 Finley a number of times in the last three years
25 and each time there was a different proposal for

1 jbrf

Colloquy

11

2 settlement, not a proposal but a different comment
3 by him on the settlements that he thought might be
4 worked out and, for example, just recently, a tender
5 offer for the stock.

6 We did not proceed with discovery. I'll
7 concede there has been no activity in the case for the
8 last two years.

9 THE MAGISTRATE: It is obvious that your
10 client didn't want you to proceed with discovery.
11 Otherwise, a firm of your stature would have expedited
12 this case and moved it to trial as you move all
13 cases to trial.

14 I am not being critical of you or your firm.
15 At best I am being critical of the movement of
16 the case where all sides have been instructed, it is
17 obvious to me, all sides have been instructed by their
18 clients not to do anything or, if they haven't been
19 instructed, it is sort of an implied instruction.

20 Now, I will permit the defendants to bring
21 on a motion before Judge Wyatt with a proviso there
22 will be no adjournments of the motions. The motions
23 will be returnable before Judge Wyatt on May 9th at 2:30
24 and, gentlemen, I suggest you follow the rules of
25 Judge Wyatt and get in touch with his clerk as to

2 how much is necessary in order to file your papers
3 and give opposing counsel time.

4 It seems clear to me that the Judge will
5 be faced with three problems -- A, should he dismiss
6 for failure to prosecute on the record which appears
7 to indicate no action in this case for three solid
8 years; B, if he does not deem it just to dismiss,
9 should he order the case to trial without any further
10 discovery in light of the desire of all counsel
11 not to have discovery as exemplified by the inaction;
12 or C, if he thinks it should not be dismissed nor
13 should it be put to trial without discovery, should it
14 be returned to the Magistrate for an expedited and
15 limited 30 days discovery.

16 I assume that the defendants will move to
17 dismiss and I assume that the plaintiffs will oppose
18 that motion and ask for a limited discovery period
19 as such.

20 My own recommendation is that the case probably
21 should be dismissed for failure to prosecute because
22 it appears on the record that the clients were not
23 much interested in pursuing their remedies in this
24 court.

25 If the Judge believes that too harsh then I

1 jhrf

2 would urge him to put the case on for an immediate
3 trial.

4 Thank you.

5 MR. MEISTER: May we understand, your Honor,
6 that pending Judge Wyatt's ruling, that --

7 THE MAGISTRATE: Nothing will happen.

8 MR. MEISTER: Pending discovery requests
9 are stayed?

10 THE MAGISTRATE: All matters are held in
11 abeyance until Judge Wyatt hears the matter and rules
12 upon it. I would assume he can rule upon it on May
13 9th. The matter is clear enough so that he can
14 exercise his discretion either in writing on the matter
15 or deciding it from the bench.

16 MR. CARROLL: Your Honor, may I say just one
17 thing to clarify the record?

18 THE MAGISTRATE: You may say anything you
19 wish.

20 MR. CARROLL: You indicated or implied before
21 that I had not complied with your direction of the
22 pretrial conference.

23 THE MAGISTRATE: No. I will withdraw that,
24 counsel. On reflection, the prior conference which
25 was not taken before a reporter left some question

1 jbrf

2 as to whether anyone complied. I withdraw my
3 suggestion that you did not comply, Mr. Carroll.
4 I think you are trying to do now what your client
5 should have done three years ago and that is serve
6 the notices and get the depositions because everybody
7 knows this case will be tried within the next 30 or
8 60 days.

9 MR. CARROLL: I would like to say that my
10 discovery notices of deposition and my document
11 requests were served in compliance with the direction you
12 gave at the pretrial conference.

13 THE MAGISTRATE: Well, there is some
14 question as to what my direction was. I was under
15 the impression that I would not permit the plaintiff
16 to go forward initially but if any defendant wished
17 to have discovery at that time that would set the
18 ball rolling and Mr. Meister indicated to me that
19 he was going to consider it and you in no way jumped the
20 gun. You just assumed that because Mr. Meister
21 decided he wouldn't, you would start.

22 I think --

23 MR. CARROLL: No. I didn't know before
24 I served my notices that Mr. Meister had decided
25 not to proceed.

1 jbrf

2 MR. WETZEL: I think that is correct.

3 THE COURT: I have the impression
4 that I would not let the plaintiff, unless Judge
5 Wyatt ruled otherwise, have initial discovery in
6 a matter of this nature.

7 MR. BARNES: That was our understanding.

8 MR. CARROLL: I didn't get that and as I
9 understand it and I knew nothing differently when I
10 set my discovery notice --

11 THE MAGISTRATE: You did nothing that the Court
12 feels is criticizable, if that be a word.

13 MR. BARNES: Could I try to get something
14 straightened out on the record?

15 THE MAGISTRATE: Yes.

16 MR. BARNES: I would like to ask Mr.
17 Carroll the same question asked on April 3rd. Has
18 he been able to communicate with his client to find
19 out whether his client has in fact tendered all of the
20 shares.

21 THE MAGISTRATE: What difference would it make

22 MR. BARNES: Reduce the damages from \$98
23 to \$88 to \$2.

24 THE MAGISTRATE: There we go into the discovery
25 You are telling the Court the case should be thrown

1 jbrf

2 out because of inaction and now you would like
3 to get some information.

4 MR. BARNES: May I then put on the record
5 that Mr. Carroll told us --

6 THE MAGISTRATE: No. Gentlemen. The record
7 is not a place where you put statements on of what
8 either side might have said. Either the case will
9 be dismissed for failure to prosecute, ordered to trial
10 without discovery or there will be a very limited
11 discovery. Those are the three alternatives. I
12 can't think of another one.

13 MR. DUFF: On this point, your Honor, it
14 seems to me that the inquiry is less a question of
15 general discovery and the equivalent of an estate
16 derivative suit and the plaintiff sells out the shares
17 and there he no longer has a right to maintain the
18 action. If plaintiff has tendered, he has reduced
19 the figures from, I gather, \$90 to \$1 a share, which
20 might explain the total lack of activity as well.

21 THE MAGISTRATE: Can't you gentlemen find
22 out if he has tendered by asking your client?

23 MR. CARROLL: I would think so.

24 MR. BARNES: We don't have the client any
25 more. That is one of the problems we have in this suit.

1 jbrf

2 THE MAGISTRATE: Your argument is that
3 the case may be moot because if he tendered their
4 wouldn't be anything here.

5 MR. BARNES: I am also trying to find out
6 whether since our last conference before your Honor
7 Mr. Carroll has been even able to communicate.

8 THE MAGISTRATE: Let's go off the record now.
9 (Discussion off the record.)
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Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CHARLES O. FINLEY, SHIRLEY M. FINLEY :
and CHARLES O. FINLEY & COMPANY, INC., :

Plaintiffs, :

70 Civ. 4306 (IBW)

-against-

PARVIN DOHRMANN COMPANY, INC., DELBERT W. :
(), WILLIAM C. SCOTT, JESUP & LAMONT, :
JOHN J. DUNPHY and F.O.F. PROPRIETARY :
FUNDS, LIMITED, :

Defendants. :

: NOTICE OF MOTION
: TO DISMISS

-----X
S I R S :

PLEASE TAKE NOTICE that on the annexed affidavits, the accompanying memorandum of law and all prior pleadings and proceedings had herein, defendants will move this Court, before the Honorable Inzer B. Wyatt, in Room 518 of the Federal Courthouse, Foley Square, New York, New York, on Friday, May 2, 1975, at 2:30 p.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure dismissing this action with prejudice on the ground that there has been an inordinate and inexcusable failure to prosecute.

Dated: New York, New York
April 29, 1975

Yours, etc.,

TOWNLEY, UPDIKE, CARTER & RODGERS

By 

A Member of the Firm

Attorneys for Defendants

Parvin/Dohrmann Company, Inc.,

Delbert W. Coleman and

William C. Scott

220 East 42nd Street

New York, NY 10017

(212) 682-4567

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Notice of Motion to Dismiss

CARRO SPANBOCK LONDIN
RODMAN & FASS

By 

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JOHN J. DUNPHY
10 East 40th Street
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MILGRIM THOMAJAN & JACOBS, P.C.

By 

A Member of the Firm
25 Broadway
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(212) 952-9292

TO:

SHEA, GOULD, CLIMENKO,
KRAMER & CASEY
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS

-against-

Defendants.

STATE OF CALIFORNIA)
County of San Diego) ss.

MICHAEL L. LAPIN, being duly sworn, says:

1. I am the Vice President and General Counsel of Argent Corporation ("Argent") and submit this affidavit in support of defendants' motion to dismiss this action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. Defendant Parvin/Dohrmann Company, Inc. (the "Company"), by then known as Recrion Corporation, merged into Argent as of August 31, 1974.

2. During our negotiations for the purchase by way of tender for all of the common stock of the Company, we made a routine investigation with respect to all litigation pending against the Company. One of the actions pending was this case. We concluded, based on the prolonged four-year inactivity in this case, that plaintiffs herein had abandoned this action.

3. Plaintiffs tendered 64,771 shares and received \$44 for each of those shares, a total of \$2,849,924.00.

4. Argent Corporation retains no counsel in New York. We were not familiar with the firm of Townley, Updike, Carter & Rodgers, attorneys of record for the Company in this action, and our relationship with them has been limited to the negotiations incident to the tender for the stock of the Company in which that firm represented the Company -- a somewhat

*Affidavit of Michael L. Lapkin in Support of
Motion to Dismiss*

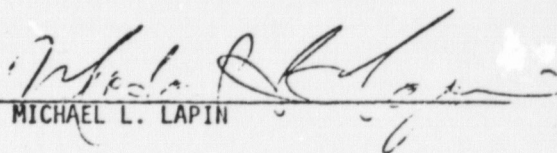
1 adversary setting. We would have immediately substituted counsel of our
2 choosing to represent the Company in this action were it not for our
3 belief that plaintiffs had abandoned this case.

4 5. Plaintiffs' inaction and delay have resulted in this action being
5 included in this Court's program to expedite the disposal of cases
6 pending for more than three years. Argent is faced with the dilemma of
7 having to litigate this case without the benefit of counsel of its choosing,
8 or, if we can secure counsel at this late date, of having to expend great
9 sums to prepare for a complex securities trial on what would be an
10 extremely accelerated basis.

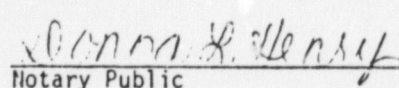
11 6. Moreover, plaintiffs' delay creates real prejudice for Argent
12 in that key officers and directors with any knowledge of the facts relevant
13 hereto are no longer with the Company and may be hostile to the Company or
14 to Argent. At the very least, they are no longer under the Company's
15 control and cannot be compelled to appear on behalf of the Company.

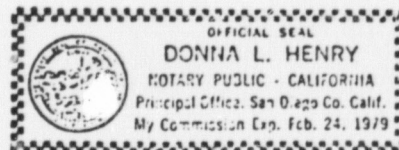
16 7. To allow this case to go forward after five years of total inactivity
17 by plaintiffs would be a gross injustice, both to defendants and to this
18 Court.

19 For these reasons, and the reasons set forth in the other papers
20 submitted in support of this motion, I respectfully urge this Court to
21 dismiss this case pursuant to Rule 41(b) of the Federal Rules of Civil
22 Procedure.

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MICHAEL L. LAPIN

Sworn to before me this 25th day of
April, 1975.


Notary Public



**Affidavit of Richard J. Barnes in Support of
Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	
CHARLES O. FINLEY, SHIRLEY M. FINLEY	:
and CHARLES O. FINLEY & COMPANY, INC.,	:
Plaintiffs,	:
	:
-against-	:
	:
PARVIN/DOHRMANN COMPANY, INC., DELBERT W.	:
COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT,	:
JOHN J. DUNPHY and F.O.F. PROPRIETARY	:
FUNDS, LIMITED,	:
Defendants.	:
-----x	

70 Civ. 4306 (IBW)

AFFIDAVIT IN
SUPPORT OF
MOTION TO DISMISS

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

RICHARD J. BARNES, being duly sworn, says:

1. I am a member of the Bar of this Court and of the firm of Townley, Updike, Carter & Rodgers, attorneys for defendants Parvin Dohrmann Company, Inc. (the "Company"), now merged into Argent Corporation ("Argent"), Delbert W. Coleman and William C. Scott. I am familiar with the facts set forth herein and submit this affidavit in support of defendants' motion to dismiss this action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute.

2. This action was commenced in April, 1970. Until this Court, pursuant to a program designed to expedite the disposition of civil cases pending for more than three years, called this case for a pretrial conference on April 3, 1975, defendants had every reason to conclude that plaintiffs had abandoned this action. It appears that it was that pretrial conference and my telephone call on April 14, 1975, to counsel for plaintiffs, in which I informed them that we would make this motion, that prompted plaintiffs to notice depositions and to demand voluminous document production by means of demands virtually identical to those served in

*Affidavit of Richard J. Barnes in Support of
Motion to Dismiss*

October 11, 1971.* This case has been inactive since its inception in 1970 and has been absolutely dormant since April, 1972.

3. Relying on plaintiffs' inactivity, which constitutes a clear failure to prosecute this action, defendants reasonably concluded that plaintiffs had abandoned this action. This is not a case in which plaintiffs' counsel has been dilatory. Rather, it is one where plaintiffs themselves have abandoned their claim.

4. If Rule 41(b) has, and is in the future to have, any meaning at all, this case must be dismissed. Plaintiffs commenced this action and did nothing for five years while memories faded and status of corporate defendants changed. To permit these plaintiffs, prompted only by this Court's action and by questionable motives, to now prosecute this case is not only grossly unfair but makes a mockery of the Federal Rules of Civil Procedure which require that plaintiffs pursue their action diligently. If ever there was a perfect example of an action which required dismissal for failure to prosecute, this is that case.

History of the Action

5. Because plaintiffs have done virtually nothing to prosecute this action, this case has an extremely simple history. This action was commenced in the District Court for the Northern District of Illinois on April 9, 1970 by the filing of a complaint alleging violations of Sections 5 and 12 of the Securities Act of 1933 and Sections 9 and 10(b) of the Exchange Act of 1934 with respect to plaintiffs' purchases of the Company's common stock in 1969. Plaintiffs held the bulk of that stock until August, 1974.

*For example, the document requests of October, 1971, and April, 1975, addressed to defendant Coleman each contain 19 paragraphs and are identical, including identical misspellings of the name of a family company, except for one request which seeks documents as to 41 persons rather than 39.

*Affidavit of Richard J. Barnes in Support of
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See Paragraph 14, infra.

6. On August 25, 1970, Judge Hoffman, pursuant to defendants' motions, ordered the transfer of this action to the Southern District of New York. More than one year passed before plaintiffs' counsel even appeared by notice dated September 30, 1971.

7. Subsequent to that notice of appearance, plaintiffs have not only failed to prosecute, they have abandoned this action. Apart from the filing of the complaint, "prosecution" has consisted solely of informal production of documents by defendants in late 1971. Since then there has been no prosecution of the action, or any visible activity that would prepare plaintiffs to try this complex case or which would indicate an intention to conduct such a trial. On the contrary, plaintiffs' behavior demonstrates that the action had actually been abandoned.*

8. Thus, there has been no discovery since or before the informal document production cited above. There have been no interrogatories served on any defendants. Plaintiffs postponed, or acquiesced in the postponement, of all noticed depositions. Finally, in April, 1972, those depositions were abandoned by plaintiff. The foresaking of the depositions was the first sign that plaintiffs had abandoned this action. Their behavior in the following three years is consistent with no other premise.

9. Since the depositions were abandoned, well-publicized actions by both the Securities and Exchange Commission and private litigants, alleging basically the same facts as the complaint here, were commenced and disposed of. Indeed, these plaintiffs received

*We recognize that defendants need only show lack of prosecution, not actual abandonment, and this affidavit is not designed to take on that unnecessary burden. However, we believe we should present the facts in their true light.

*Affidavit of Richard J. Barnes in Support of
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833 shares of stock valued at \$29,779.75 in a 1972 settlement of the action brought by the SEC. None of the defendants hereto were required to contribute to that settlement.

10. More important, neither the SEC settlement, nor the widely publicized settlement of the class action based on the SEC action, nor a subsequent settlement of a private action (described in reports to shareholders, including plaintiffs) stimulated plaintiffs to revive this case which was based on similar claims. In fact, those settlements did not even move plaintiffs to do so much as call defendants to find out if their claims might also be settled.

11. Since that time, there have been two substitutions of counsel for defendants. In December, 1973, and January, 1974, respectively, F.O.F. Proprietary Funds, Ltd. and the Company noticed that they had retained present counsel. Neither notice brought any response from plaintiffs. There was no indication of any kind to those new counsel (any more than to those who remained in the case) that plaintiffs intended to prosecute and bring this action to trial.

12. In December, 1973, the Company notified all its shareholders, including plaintiffs, of an exchange offer whereby the Company's common stock could be exchanged for debentures. This prompted no action or response by plaintiffs.

13. In April, 1974, the Company announced that an agreement had been reached whereby Argent would purchase by way of tender all shares of the Company's stock (including those still held by plaintiffs). A tender offer was made to all shareholders and the merger of the Company into Argent was completed on August 31, 1974. Once more, plaintiffs gave no indication to counsel for any defendant that they had any interest in this action.

14. Plaintiffs tendered their shares pursuant to the

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Argent offer and they received \$88 per share.* This, coupled with plaintiffs' recovery in the SEC settlement (see Paragraph 9, supra)* and stock and cash dividends paid to all shareholders (including plaintiffs) reduces or eliminates any damages that plaintiffs could prove if everything they allege in the complaint was true and could be proven. Plaintiffs' purchase price for the bulk of their shares was \$90 per share. Plaintiffs' only activity in regard to this case has been to authorize his attorney to appear at the pretrial hearing called by this Court on April 3, 1975 in an attempt to clear its calendar. But that manifestation of interest in the case (if it can be called that) has been extraordinarily limited. Thus, despite having been advised that this case could go to trial at anytime in the next few weeks, plaintiffs have not communicated with their counsel. On April 3, plaintiffs' counsel represented to me that he would contact plaintiffs to learn if they tendered their shares to Argent. When I spoke to plaintiffs' counsel on April 14 to advise him of this motion and again on April 18 at a pretrial conference before Magistrate Schreiber, I was told that plaintiffs had not returned the several telephone calls which had been made to them in the intervening two weeks. This does not sound like plaintiffs who are interested in pursuing their claim. Nor does it sound like plaintiffs who are mindful of their obligation to the Court to prepare themselves to present a cogent case in as short a time as possible.

15. At the April 18 pretrial conference before Magistrate Schreiber, this motion was discussed and the Magistrate recommended that this Court grant the motion and dismiss this action for failure to prosecute.

"My own recommendation is that the case probably should be dismissed for failure to

*The actual price was \$44 per share but the stock had split 2-for-1 between plaintiffs' purchases and the tender offer.

**It appears that plaintiffs tendered the 833 shares received in the SEC settlement, producing \$73,304 which would further reduce any alleged damages.

*Affidavit of Richard J. Barnes in Support of
Motion to Dismiss*

prosecute because it appears on the record that the clients were not much interested in pursuing their remedies in this court." Transcript, Hearing before Magistrate Schreiber, April 18, 1975, p.12.

I respectfully submit that the use of the word "probably" was in deference to this Court and not an equivocation of the recommendation of dismissal.

16. There is little question that this case would have remained in its abandoned state had it not been for this Court's program to expedite the disposition of cases commenced more than three years ago. It was not defendants' burden to prompt plaintiffs into action by earlier moving for dismissal. Nor would it have been appropriate for defendants to engage in discovery in a case that was dormant and apparently abandoned.

Defendants Have Been
Severely Prejudiced

17. The law provides that the Court may assume prejudice from substantial delay in prosecution, and certainly from a five-year delay as we have here. That legal presumption is buttressed here, however, for there has been very real prejudice to these defendants.

18. Argent, when it announced and subsequently consummated its purchase of the Company, believed that this action had been abandoned. My firm is counsel of record for the Company in this action. We have been informed by the management of Argent that, if they had their choice, they would seek new counsel to represent the Company. My firm is unfamiliar with Argent personnel, has no established channel of communication with the Company and would be hampered in its attempts to defend this action. Argent appears even less comfortable with the situation.

19. Moreover, while I need not point out to this Court

*Affidavit of Richard J. Barnes in Support of
Motion to Dismiss*

that in the six years since the acts occurred on which this case is based, memories undoubtedly have faded and evidence in the form of books and records may have been forgotten or lost, the passage of time poses real prejudice to defendants for other reasons.

20. In the five years since this action was commenced, the individual who served as house counsel for the Company has left its employ. The same is true of both the individuals who served as financial officer and the one who served as secretary to the Company. All three are outside the subpoena power of this Court and I am informed and believe none would voluntarily testify. In addition, I am certain that other important witnesses not only have faded memories, but have faded from the scene.

21. I do not believe it is necessary to more fully detail the prejudice a long delay in a trial can cause, but, in this complex case, one further fact appears worthy of attention. In preparing its defense of the class action (and another case similar to this one, which was disposed of in February, 1974), the Company retained an expert witness. His testimony was to be based on a series of charts, graphs and other relatively complex documentation, and he spent a considerable amount of time preparing himself to testify. He also received a considerable fee for that preparation. That expert was discharged after termination of the last active case arising out of the relevant events. Apart from the question of whether that expert would be available on such short notice, it is clear he could not now testify without elaborate re-preparation that would subject the Company to an expense it would not have had if this case had been prosecuted in the same time frame as its companion actions.


22. In addition, the corporate changes that have taken place in these five years are examples of why courts are so willing to assume that prejudice exists from this kind of inordinate

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Motion to Dismiss*

delay and why the Federal Rules of Civil Procedure permit dismissal for such delay. Defendant F.O.F. Proprietary Funds is now under the control of its parent's liquidator, allegedly having been the victim of Robert Vesco and others, and its prior officers and directors are unavailable for trial and key employees are no longer employed by F.O.F. and may indeed be hostile. Jesup & Lamont has assumed a new corporate structure and at least one former partner, who would be a key witness, is no longer a partner and no longer under its control. The Company, too, presently has new management and new owners, owners who had reasonably concluded that this action had been abandoned.


23. When one views the history of this case, including recent history, one is bound to wonder why a case which was dormant when the potential recovery was \$2,500,000 now purports to be active when money damages have been virtually eliminated by plaintiffs' acceptance of the Argent tender, leaving one with the unpleasant conclusion that plaintiffs' recent behavior is not so much a rekindled desire to prosecute, but an attempt to give this matter a quantum of nuisance value, in the hope that it will yield a settlement offer.

24. Plaintiffs have failed -- without a single adequate reason, without a shred of justification -- to use the processes this Court has made available to them for five years. They should not now be allowed to misuse those processes.


RICHARD J. BARNES

Sworn to before me this

19th day of April, 1975.


Notary Public

ADELAIDE R. O'NEILL
NOTARY PUBLIC, State of New York
No. 03-3221185
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976

**Affidavit of Reginald Leo Duff in Support of
Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

CHARLES O. FINLEY, SHIRLEY M. FINLEY	:	
and CHARLES O. FINLEY & COMPANY, INC.,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	70 Civ. 4306 (IBW)
	:	
PARVIN/DOHRMANN COMPANY, INC.,	:	
DELBERT W. DOLEMAN, WILLIAM C. SCOTT,	:	
JESUP & LAMONT, JOHN J. DUNPHY	:	
and F.O.F. PROPRIETARY FUNDS, LIMITED,	:	
	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

REGINALD LEO DUFF, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and of the firm of Carro, Spanbock, Londin, Rodman & Fass, attorneys for defendants JESUP & LAMONT and JOHN J. DUNPHY. I submit this affidavit in support of the joint motion of all defendants, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss this action for non-prosecution.

2. As is set forth in the moving affidavits of our co-defendants, there has been no activity by plaintiff in this action since early 1972, the action having been commenced in 1970 in the United States District Court for the Northern District of Illinois, Eastern Division, and thereafter transferred to this Court. Even prior to the last activity by plaintiff in early 1972, such activity as there was was spasmodic.

*Affidavit of Reginald Leo Duff in Support of
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3. This action is purportedly brought pursuant to sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77e, 77i; Rules 10b-5 and 10b-6 under section 10(b) of the Securities Exchange Act of 1934, 17 CFR § 240.10b-5, § 240.10b-6, 15 U.S.C. § 78j(b), and other provisions of the latter Act. Plaintiffs allege that in March and April 1969 they purchased a significant block of stock of defendant Parvin/Dohrmann Company, Inc. ("Parvin"), some of which is alleged to have been part of a private placement of securities theretofore purchased by defendant F.O.F. Proprietary Funds, Ltd. ("FOF") and resold by it with the assistance of defendants Jesup & Lamont ("Jesup"), a New York broker-dealer, and Dunphy, then a partner of Jesup. It is alleged that various of the defendants had conspired to manipulate the price of the common stock of Parvin; that the FOF private placement was in fact a public offering; and was attended by misrepresentations and omissions of material facts (some of which are alleged to have occurred after plaintiffs' alleged purchases). The complaint seeks rescission of the purchase, and/or damages in an amount of approximately \$2,500,000.

4. The transaction in suit, among others, has been the subject of a civil action for injunction commenced by the Securities and Exchange Commission in 1969, which action has since been settled, defendant Jesup declining to contribute to the settlement proper. In settling that action, none of the parties thereto conceded any liability, or that it had committed any of the violations charged by the Commission.

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5. Defendants and the Court have been advised that since the commencement of this action, plaintiffs have tendered their Parvin stock, pursuant to a recent tender offer therefor, thereby reducing their claimed damages from approximately \$2,500,000 to approximately \$200,000.

6. As is set forth in the moving affidavits submitted on behalf of Argent Corporation, the successor by merger to Parvin, and by FOF, the managements of those two corporate defendants have changed in the years since the acts complained of, and witnesses with knowledge of the facts upon which the complaint herein is purportedly based are no longer available or subject to the compulsory process of this Court. It has been alleged, in fact, that the former management of FOF is hostile to the present management of FOF, and that voluntary cooperation cannot be expected from members of such former management with knowledge of the facts.

7. In the case of defendant Jesup, both defendant Dunphy and William P. Suter, who were at relevant times partners of Jesup but are no longer affiliated with its corporate successor, were the individuals with personal knowledge of the transactions giving rise to the plaintiffs' claims. While Mr. Dunphy is a defendant herein and so is subject to the Court's power and jurisdiction, Mr. Suter is a non-resident of the State of New York, and whether or not he is subject to the compulsory process of this Court, or would be willing and able to appear voluntarily to testify at the trial which the Court has scheduled to commence on May 6, 1975, is not known to your affiant.

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8. Quite apart from any prejudice or inconvenience which may result to defendant Jesup in the preparation and presentation of its defense by reason of the potential unavailability of Mr. Suter, that defendant is substantially prejudiced by the alteration in the management of FOF and by the unavailability of certain of its former principals. Thus, plaintiffs charge that the transaction which resulted in plaintiffs' purchase of shares previously owned by FOF was not, as represented, a private placement, but rather was a public offering, and this conclusion is bolstered by the contention that in acquiring shares of Parvin in October 1968, FOF should have known that Nevada law prohibits common ownership of gambling casinos both in Nevada and elsewhere. Because of Parvin's ownership of a casino in Nevada (which ownership presumably was imputed to FOF by reason of its significant stock ownership in Parvin) and because of FOF's contemporaneous ownership of a gambling casino in the Bahamas, the Nevada Gaming Commission in April 1969 directed FOF to dispose of its stock ownership in Parvin. It is alleged that FOF's resulting sale of stock of Parvin was in part made to the plaintiffs.

9. Whether or not the sale of FOF's stock was properly a private placement or, as plaintiffs charge, a public offering of Parvin stock, turns very largely upon the distributive intent of FOF at the time of its purchase, which is usually a question of fact. Vohs v. Dickson, 495 F.2d 607, 625 (5th Cir. 1974). Whether or not, by reason of their having assisted in FOF's purported private placement of securities in April 1969, defendants

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Jesup and Dunphy became "underwriters" within the meaning of section 2(11) of the Securities Act, 15 U.S.C. § 77b(11), may turn not upon their own contemporaneous understanding of the facts relating to the nature of the transaction, but upon whether FOF was itself an underwriter, as is charged in the complaint. FOF's status turns on its own distributive intent, and if FOF is an underwriter, its status as such could well rub off on Jesup and Dunphy, and expose them to liability under the 1933 Act. The evidence of FOF's distributive intent, and therefore of its status, appears to be exclusively in the possession of the former principals of FOF, who, as FOF's current motion papers demonstrate, are not merely uncooperative or unavailable, but hostile. The unavailability and hostility of former FOF personnel with knowledge of the pertinent facts thus directly and adversely affects the ability of defendants Jesup and Dunphy to defend against the section 12 claim.

10. Similarly, Jesup is accused of having participated in the claimed manipulations of Parvin stock by reason of its having crossed sales of Parvin stock theretofore owned by principals of Parvin, including a pension trust, to certain of its own customers. While Jesup can itself testify as respects its role in those transactions, and its then knowledge of the facts, it must perforce depend upon the personal knowledge of two of its former partners, one of whom is a defendant herein, but the other of whom is not. In some cases, the sellers of the stock through Jesup were not under common control with Parvin, and their conduct-

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rative testimony would be of inestimable value to Jesup's defense against the Rule 10b-6 claim before a jury. Such evidence is not presently available to Jesup by reason of wholesale changes in the management of Parvin, and indeed, in the subsequent merger of Parvin itself.

11. Finally, and for precisely the same reasons, Jesup is deprived by the change in Parvin's management, from the opportunity of calling as witnesses members of Parvin's former management, to defend against the claims of violation of Rule 10b-5 and other disclosure rules. Jesup and Dunphy are not accused themselves of having made any representation whatever to plaintiffs, so that their liability, if any, on this charge is necessarily dependent on the liability of Parvin. The charge here is that Parvin in its public and private disclosures, and in its periodic filings with the SEC, misstated its earnings and facts relating to its business. Jesup was not in possession of inside information concerning Parvin, but is not in a position to prove that fact except by its naked denials of such knowledge. It would have been in a position to prove those facts had plaintiff diligently prosecuted the case and deposed Parvin and its then principal officers.

12. The present motion by all defendants comes as a result of the reassignment of the present action to this Court and in response to the Court's invocation of the program for the expedited disposition of civil cases pending more than three years. A pre-trial conference was held April 18, 1975 before

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Magistrate Schreiber, who recommended that the action should "probably" be dismissed. I respectfully suggest that the Magistrate's use of the word "probably" should not be taken as an equivocation in his recommendation, but rather as a sign of deference to the obvious fact that it is for this Court and not for the Magistrate to make that decision. I respectfully submit that when all the equities are considered, the Magistrate's recommendation is sound and should be adopted by the Court.

13. I have heretofore stressed prejudice to the defendants Jesup and Dunphy which flows directly from the non-prosecution of a case which all defendants with substantial reason believed to be abandoned in fact. There is additional prejudice, resulting from the lack of time in which counsel may properly prepare for trial. The appearances before Magistrate Schreiber and this Court all occurred during a time when my partner, Jerome J. Londin, Esq., was engaged in a protracted criminal trial before Hon. Whitman Knapp, U.S.D.J., in USA v. Sloan, et al., 74 Cr. 859. Mr. Londin had appeared for defendants Jesup and Dunphy in the SEC civil action heretofore referred to, and in the other civil actions in which those defendants were joined, arising out of the Parvin transactions, and he is familiar with the background of this action. The associate who had assisted Mr. Londin in that action is no longer employed by my firm, and I had no prior involvement in any aspect of the several litigations. On April 28, 1975, after the conference before this Court I advised Mr. Londin of the Court's direction that a pre-trial order and proposed

*Affidavit of Reginald Leo Duff in Support of
Motion to Dismiss*

charges be submitted by this Friday, May 2, 1975, and the parties be ready to go to trial on May 6, 1975, and he informed me that he will not be ready to try this action on that date, even if his criminal trial is concluded prior thereto.

14. At Mr. Londin's request, I attended the meeting with Magistrate Schreiber last week, and appeared before this Court on April 28, 1975, believing that the conference would be devoted to the pending motion to dismiss for non-prosecution, in accordance with the Magistrate's putative recommendation. Accordingly, I had not fully familiarized myself with the underlying facts (which necessarily had to be culled from the voluminous file in the SEC proceeding) and from the pleadings herein, and was unable to advise the Court as to how much time defendants Jesup and Dunphy would require to present their defense. After a review of the files, I would estimate that they would require a minimum of three days, and perhaps more, in order properly to present their defense.

15. The trial date set by the Court is particularly inconvenient to me personally. In addition to attempting to complete a response to a 119 page brief filed in an action pending before Judge Werker, which raises a number of virtually unprecedented questions under the Securities Act and the Exchange Act, (which response is due next week), I have a commercial arbitration due to commence on May 8, 1975, and had scheduled a meeting with my clients, who must come to New York from Chattanooga, Tennessee,

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on May 7, 1975. I am also currently engaged in an informal investigation by the SEC in another matter which I am handling during Mr. Londin's absence at trial.

16. However, whether Mr. Londin is compelled to try this action, if it goes to trial, or I am obliged to do so, having acquainted myself with the complex facts in little less than a week, I respectfully submit that forcing these defendants to trial on such short notice and without time for adequate preparation gives them only the semblance of due process, and then only in the interest of clearing the docket of this Court of stale cases. I think all members of the Bar of this Court, as well as the Judges of this Court, are aware of the crush of the dockets, but I respectfully submit that stale cases generally are left unprosecuted because they lack merit, or because, as may be the case with plaintiff Charles O. Finley, the plaintiff has other fish to fry. At the hearing, but off the record, the Magistrate inquired why defense counsel had not moved earlier to dismiss for non-prosecution if they genuinely believed that the action had been abandoned by the plaintiff. There are two short answers to the inquiry, both of which should be considered by the Court.

17. In the first place, to the extent that defense counsel might have affirmatively considered the question of making such a motion, if they did, I think that the Court can take judicial notice that the timing of such a motion is often a very delicate proposition because, if made too soon, it will be

*Affidavit of Reginald Leo Duff in Support of
Motion to Dismiss*

denied, and whenever made, it is likely to resuscitate a moribund action if for no other reason than that the non-prosecution may generally be laid at the feet of plaintiff's counsel. In such cases, counsel is likely to be more concerned with the possibility of being charged with its own malpractice than with the merit or lack of merit of the claim, and will proceed accordingly. The latter factor does not appear to have any application here, as it is the understanding of defense counsel that the plaintiffs themselves have not been cooperating with their counsel.

18. The second, and perhaps more realistic reason why defendants do not customarily take up the cudgel to remind plaintiffs that they have pending unprosecuted cases, is that most counsel have more work to do in pending, actively prosecuted, cases than time in which to do it, and unprosecuted cases have a way of being forgotten.

19. I respectfully submit that the interests of justice require that the action be dismissed for non-prosecution, without burdening defense counsel with the obligation of preparing for a jury trial which, because of the present state of the record and virtually total lack of discovery and of any activity in more than three years, is likely to lead to a directed verdict at the close of the plaintiffs' case. If it is the purpose of the expedited disposition procedure to rid the docket of stale cases, and incidently to alert the Bar that the Court will not tolerate non-prosecution of cases which purport to be substantial, the way to achieve that dual goal is by dismissing out of hand a case as

*Affidavit of Reginald Leo Duff in Support of
Motion to Dismiss*

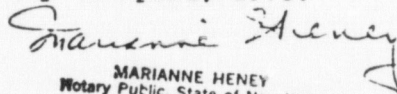
eggregiously unprosecuted as the present action, and not by compelling defense counsel to prepare for trial on no meaningful notice whatever. A trial held in such circumstances cannot be productive of a just verdict, and because of the lack of proper preparation by all counsel is likely to result in error which will only lead to a further cluttering of the Court's docket on remand.

20. Defendants' motion to dismiss pursuant to Rule .
41(b) of the Federal Rules of Civil Procedure should be granted.


REGINALD LEO DUFF

Sworn to before me this

29th day of April, 1975.



MARIANNE HENEY
Notary Public, State of New York
No. 41-6352250
Qualified in Queens County
Certificate No. 41-6352250
Commission Expires March 30, 1976

**Affidavit of Robert A. Meister in Support of
Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

CHARLES O. FINLEY, et al.,	:	
	:	
Plaintiffs,	:	70 Civ. 4306 (IBW)
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
PARVIN/DOHRMANN COMPANY, INC.,	:	
et al.,	:	
	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT A. MEISTER, being duly sworn, deposes and says:

1. I am a member of the firm of Milgrim Thomajan & Jacobs P.C., attorneys for defendant F.O.F. Proprietary Funds, Limited ("FOF Prop."), and I make this affidavit in support of defendant's motion to dismiss this action for plaintiffs' prolonged and willful failure to prosecute. This action was commenced in the Northern District of Illinois on April 9, 1970 and transferred to this Court by Order dated August 25, 1970. At no time from April 9, 1970, the time this action was commenced, to the pretrial conference five years later held by this Court on April 3, 1975 did plaintiffs serve a notice to take deposition of defendant FOF Prop., an interrogatory directed to FOF Prop. or a request to FOF Prop. to produce any documents.*

* After the case was transferred, plaintiffs did serve notices to take the depositions of other defendants, but these were adjourned and never taken. Indeed, the last stipulation adjourning said depositions was signed on January 10, 1972; thereafter, plaintiffs clearly abandoned the intention to take those depositions, as evidenced by their failure even to file stipulations of adjournment.

*Affidavit of Robert A. Meister in Support of
Motion to Dismiss*

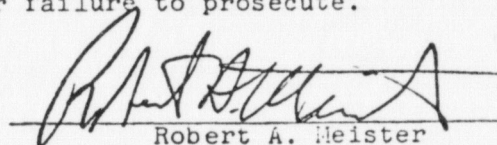
2. F.O.F. Prop. is and at all times was the wholly-owned subsidiary of The Fund of Funds, Limited. It is a fact of some notoriety that in 1971 The Fund of Funds, Limited came under the control of Robert L. Vesco, who in 1972, together with various co-conspirators, looted \$60 Million of moneys belonging to FOF Prop. See, e.g., the allegations of Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ. 5002, and The Fund of Funds, Limited, et al. v. Robert L. Vesco, et al., 74 Civ. 1930. Vesco and his cohorts have fled the country and are now resident in Costa Rica. On August 1, 1973 the Supreme Court of Ontario, Canada appointed a liquidator for The Fund of Funds, Limited and the liquidator has thereafter become the president of FOF Prop. As a result, all of the former management and employees of The Fund of Funds, Limited and FOF Prop. have now disbanded and are no longer connected in any way with either.

3. The relevance to this motion of the events described in paragraph 2 of this affidavit is clear, for these intervening acts have deprived FOF Prop. of the ability to call any officer, director or employee who might have any knowledge with respect to the allegations of the complaint of events which transpired in 1969. Indeed, prior management is not only unavailable but also hostile and, in the case of Edward M. Cowett, dead. Thus, FOF Prop.'s ability to defend has been severely prejudiced by the fact that plaintiffs, who commenced this action in Illinois in April 1970, have never taken any deposition or propounded any interrogatory. (Plaintiffs never even attempted to take the depositions of FOF Prop. by serving any notice.) In this connection it should be noted that FOF Prop. was not alleged by the SEC to have been a member of the

*Affidavit of Robert A. Meister in Support of
Motion to Dismiss*

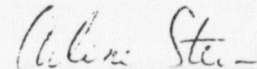
control group as alleged in those proceedings, and insofar as we are able to tell, no officer, employee or director of The Fund of Funds, Limited or FOF Prop. testified in the proceedings in Securities and Exchange Commission v. Parvin/Dohrmann Company, Inc. Thus there is no record of what FOF Prop. knew or did not know concerning the facts alleged in the complaint.

In all of these circumstances FOF Prop. reasonably could regard this action as one commenced without any basis in fact, in a moment of pique, by a well-known frequent litigant who simply filed his complaint and immediately lost interest in the action. Clearly, plaintiff has abandoned his claim by his failure to do anything at all for five years. Undoubtedly that failure to prosecute would have persisted were it not for this Court's direction that the case be set down for immediate trial.* In these circumstances, plaintiffs should not be allowed to benefit from the prejudice which has occurred to FOF Prop. as a result of plaintiffs' total inaction and total failure to prosecute this action during the past five years. The complaint should be dismissed for failure to prosecute.


Robert A. Meister

Sworn to before me this

18th day of April 1975.


Notary Public ARLENE STEIN
Notary Public, State of New York
No. 4502302
Qualified in Queens County
Commission Expires March 30, 1978

* Plaintiffs' lack of interest in this action is illustrated by events in January 1974 when, shortly after my firm was substituted as counsel for FOF Prop. following the assumption by the liquidator of control of FOF Prop., I wrote this Court a letter dated January 22, 1974 suggesting that this case be consolidated with another action which appeared to involve many of the same fact questions. Although a copy of that letter was sent to counsel for plaintiffs in this case, plaintiffs neither responded thereto nor took any action despite this reminder almost a year and one-half ago of this case's existence.

**Affidavit of Martin I. Shelton in Opposition to
Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	
CHARLES O. FINLEY, SHIRLEY M.	:
FINLEY and CHARLES O. FINLEY &	:
COMPANY, INC.,	: 70 Civ. 4306
Plaintiffs,	:
-against-	:
	: <u>AFFIDAVIT IN</u>
	: <u>OPPOSITION</u>
	: <u>TO MOTION</u>
	: <u>TO DISMISS</u>
PARVIN/DOHRMANN COMPANY, INC.,	:
DELBERT W. COLEMAN, WILLIAM C.	:
SCOTT, JESUP & LAMONT, JOHN J.	:
DUNPHY and F. O. F. PROPRIETARY	:
FUNDS, LIMITED,	:
Defendants.	:
-----x	

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Martin I. Shelton, being duly sworn, deposes and
says:

1. I am a member of the firm of Shea Gould Climenko Kramer & Casey, attorneys for plaintiffs. I make this affidavit in opposition to the motion of all of the defendants for an order directing "dismissal of this action with prejudice on the ground that there has been an inordinate and inexcusable failure to prosecute" (Defendants' Notice of Motion). In support of their motion, defendants submit affidavits of their respective attorneys. Also submitted is an affidavit by Michael L. Lapin, Vice President and General Counsel of Argent Corporation ("Argent") into which defendant Parvin/Dohrmann Corporation ("Parvin/Dohrmann"), then Recrion Corporation ("Recrion"), was merged on August 31, 1974 following a tender offer by Argent for Recrion stock.

2. I will attempt in this affidavit to answer each of the contentions set forth in the four moving affidavits. I will also present plaintiff's side of the story. First, however, I would like to make a few preliminary comments.

*Affidavit of Martin I. Shelton in Opposition to
Motion to Dismiss*

Recent Events

3. Defendants were informed over a month ago of the assignment of this case to Magistrate Schreiber and the scheduled pretrial conference on April 3, 1975. Although I was not present at the pretrial conference on April 3, I have been informed by my associate who was present that defendants' counsel gave no indication that they intended to move to dismiss for lack of prosecution and, indeed, counsel for defendant F.O.F. Proprietary Funds Limited ("FOF") requested the opportunity to conduct pretrial discovery. This request resulted in Magistrate Schreiber setting up a discovery schedule and directing counsel for FOF to submit an order reflecting this schedule which would have provided for document production and depositions, all to be concluded by May 9, 1975. Following the April 3 pretrial conference we prepared and served on April 14 (in accordance with the schedule set up by the Magistrate) document requests and deposition notices addressed to all defendants.

4. On April 14 my associate, Daniel L. Carroll, received a telephone call from Mr. Barnes of Townley, Updike, Carter & Rodgers, attorneys for defendants Parvin/Dohrmann, Coleman and Scott, in which the proposed motions to dismiss was mentioned for the first time. In a letter sent by Mr. Barnes to Magistrate Schreiber on April 15, Mr. Barnes advised the magistrate that defense counsel had conferred and decided to make a motion to dismiss. Mr. Barnes further stated in his letter that he had intended to prepare the motion papers the previous week but had not done so because of his involvement in another matter and that it was defendants' intention to submit papers within the

*Affidavit of Martin I. Shelton in Opposition to
Motion to Dismiss*

next few days in support of such a motion.*

5. At a subsequent pretrial conference held on April 18, Magistrate Schreiber directed that defendants' motions be made returnable on May 9. Defendants still had not served the papers on April 28 when counsel appeared before the Court for a conference (at which time a trial date of May 6 was set and the return date for the proposed motion was moved up by the Court to May 2) and did not serve said motion papers until 5:14 P.M. on April 29, less than three days before the return date.

6. The above is significant for two reasons. First, plaintiff Finley's purchase of 30,000 of the 37,000 shares of Parvin/Dohrmann stock involved herein took place on April 28, 1969. To the extent a six-year statute of limitations applies to any of plaintiff's claims, they would now be barred. Therefore, whether any dismissal at this point was with or without prejudice may be academic since it might well bar any reinstitution of this action. However, had defendants been more diligent in bringing on this motion, plaintiffs would have urged the Court that any dismissal should be without prejudice, thus permitting the reinstitution of this action.

7. Also, defendants' delay until 5:14 P.M. on April 29 in serving its motion papers precluded the possibility of obtaining an affidavit from Mr. Finley who lives and has his office in Chicago. Thus, I can merely report in this affidavit what Mr. Finley has told me. Of course, if the Court deems it important to have an affidavit from Mr. Finley, this can be arranged if a little more time is given. However, I am told that the Court,

* Meanwhile counsel for FOF had withdrawn his discovery request and the magistrate in turn ruled that there would be no further discovery, thus, in effect, vacating the notices served by plaintiffs on April 14, 1975.

*Affidavit of Martin I. Shelton in Opposition to
Motion to Dismiss*

at the conference held last Monday, recognized that plaintiffs were not being given the required notice and stated that it would entertain plaintiffs' opposition even if made orally on the return date.

8. Contrary to the suggestion contained in defendants' papers, I have been in frequent contact with Mr. Finley over the past week. Mr. Finley personally flew in from Chicago this past Tuesday to discuss the case and assist in our preparations for trial. Unfortunately, Mr. Finley had just left my office when defendants served their motion papers. However, since I knew that defendants intended to make this motion, I discussed in detail with Mr. Finley his response to the contentions I thought defendants would make in support of their motion.

9. As a final preliminary comment I would like to respond to Mr. Barnes' charge (contained in paragraph 23 of his affidavit) that plaintiff does not wish to prosecute this action but is attempting "to give this matter a quantum of nuisance value". This could not be further from the truth. At a conference this past Tuesday I expressly rejected Magistrate Schreiber's suggestion that plaintiff should settle this case for nuisance value. Moreover, I can say without hesitation based upon my discussions with Mr. Finley that he intends to prosecute this case to the fullest extent possible. I further state that, based upon my knowledge of the facts involved herein, plaintiffs have very meritorious claims which I respectfully suggest deserve to be heard.

Explanation for Delay

10. As the Court knows, this action was commenced in Illinois by plaintiffs' Chicago counsel. Defendants' motion to transfer was vigorously opposed because obviously it was very

*Affidavit of Martin I. Shelton in Opposition to
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inconvenient for Mr. Finley who lives and has his office in Illinois to have to prosecute this action in New York. Nevertheless, Judge Hoffman directed that the action be transferred, primarily because he found that documentary evidence and witnesses were more readily available in New York and that there was pending in this Court other litigation arising out of the same transactions.* I respectfully suggest that the fact that plaintiffs have been forced to litigate in a forum not of their own choosing deserves much weight and militates against the granting of the instant motion.

11. Following the entry of Judge Hoffman's transfer order, plaintiffs were confronted with the task of retaining New York counsel. As I understand, it this was handled by plaintiffs' Chicago counsel who contacted my firm concerning our possible representation of plaintiffs. In early October 1971 we filed our Notice of Appearance and immediately began a detailed review of voluminous material then available to us and later obtained from the attorneys for defendants Coleman, Scott and Parvin/Dohrmann in response to our notice for production of documents served on October 4, 1971.

* Defendants in support of their motion to transfer, relied heavily upon the actions then pending in this Court. Indeed, defendants Dunphy and Jesup & Lamont urged that this case would "likely be consolidated for discovery and trial with similar suits presently pending in [this] court." Of course, after transfer, defendants took no action to consolidate this action with such other actions, all of which I am informed have now been disposed of, one as recently as February of 1974. I might also note that the present attorneys for all of the defendants herein (other than FOF) submitted affidavits in connection with the transfer motions, detailing to the Court the tremendous amount of work their respective firms had already done in connection with the subject matter of this action - quite inconsistent with their present claims that they have been prejudiced by reason of their apparent failure to previously investigate and document the transactions involved herein.

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12. Also on October 4, 1971 we served notices to take the depositions of defendants Parvin/Dohrmann, Coleman and Scott. These depositions were adjourned a number of times, first in order to permit time for us to review documents produced by these defendants and then later because, after reviewing the testimony of Messrs. Scott and Coleman before the SEC and the American Stock Exchange, we thought that depositions might not be necessary in light of this prior testimony. I have been told by Mr. Carroll that this was discussed by him with either Mr. Daniel or Mr. Barnes of the Townley, Updike firm who agreed to this approach and that this was the reason stipulations adjourning the deposition ceased being executed in April of 1972 - not because as defendants state, we "abandoned" the deposition.

13. In any event, following our detailed review of the transcripts and other documents produced pursuant to our notice to produce, we prepared a lengthy memorandum which outlined information we thought should be obtained from plaintiff before we proceeded with further discovery. This memorandum was forwarded to plaintiffs' Chicago counsel with whom we were then dealing, with the explanation that we were deferring further discovery until we received the information requested. We communicated with Chicago counsel on a number of occasions after that and reiterated our need for such information. Apparently there was a breakdown in communications between Mr. Finley and Chicago counsel in connection with this matter in that Mr. Finley has informed me that our request for information as outlined in the memorandum we prepared was not communicated to him until this past August.

14. Mr. Finley also told me that he had a serious heart attack in August of 1973 and, at the direction of his

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doctors, was confined to a very limited schedule for one year thereafter and is still under doctors orders to restrict his activities. I'm sure the Court is well aware of Mr. Finley's wide-ranging business activities. In addition to his other business interest Mr. Finley is, of course, the owner of the Oakland Athletics baseball team and until recently owned a professional hockey team and a professional basketball team which he tells me he disposed of in compliance with his doctor's orders to limit his activities. Defendants may well be right when they infer that this matter may not have been the most pressing of matters and in the forefront of Mr. Finley's thoughts in the past few years. But, I suggest that this was not because he did not consider it important. Rather, I suggest it was due to the other pressing matters which Mr. Finley had to deal with on a day to day basis. He obviously thought this matter was being attended to by counsel but, was incorrect in this assumption in view of the breakdown in communications between him and Chicago counsel.

15. In short, the delay in this action was caused first by a breakdown in communications between Mr. Finley and his Chicago counsel and second, by his recent health problems. Mr. Finley has informed me that he never intended to abandon the claims asserted in this action* and has instructed me to do

* With respect to defendant's assertion that they were led to believe that plaintiffs had abandoned the claims asserted in this case, I respectfully refer the Court to a letter dated August 9, 1972 addressed to the Clerk of the United States District Court in regard to the settlement of the class action entitled Moseley v. Scott, 69 Civ. 4574, a copy of which is annexed hereto as Exhibit A. As the Court will note, in that letter plaintiffs refer to the pendency of this action and the fact that they are pursuing their own rights and remedies regarding certain of the matters involved in the Moseley litigation "and desire to continue to act for their own behalf". Accordingly, plaintiffs requested exclusion from the Moseley class and the proposed settlement therein. The records of this Court indicate that the attorneys for defendants Parvin/Dohrmann, Scott and Coleman were also attorneys of record for Coleman and Scott in the Moseley litigation.

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whatever is necessary to press these claims to the fullest extent possible. In this connection, I note that defendants infer in their affidavits that any damages plaintiffs might have been entitled to recover in this action have been reduced or eliminated by reason of the recent tender offer pursuant to which Mr. Finley received \$88.00 per share for all but 5,000 shares of the stock involved herein. This is just not true. First, I am informed that in November of 1972 the corporate plaintiff disposed of the 5,000 shares referred to above and suffered a net loss on this stock of approximately \$233,000. I am also informed that the individual defendants suffered a net loss of \$78,000 on the stock tendered pursuant to the August 1974 tender offer. Thus, without taking into account cash dividends received on the stock during the period it was held, there is a total net loss of over \$300,000 which plaintiffs are still seeking to recover in this action. In addition, I am informed that in order to purchase the 30,000 shares of lettered stock in April of 1969, Mr. Finley borrowed over \$2,700,000 on which he has paid over \$1,000,000 in interest over the past few years. Plaintiff Finley contends that he is entitled to recover this interest as damages, especially in view of the fact that he was entitled in 1969 to rescission of the transaction in which he purchased the 30,000 shares because of the violation of § 5 of the Securities Act of 1933.

Defendants' Alleged Prejudice

16. Defendants in the affidavits submitted in support of the instant motion advance a number of theories which they contend demonstrate the substantial prejudice they have suffered by reason of the delay in this case. Before turning to these specific contentions, I should like to point out to the Court that after this action was transferred from Illinois, none of the

*Affidavit of Martin I. Shelton in Opposition to
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defendants took any action whatever to either obtain discovery of plaintiffs or to obtain the advantages of defending this action in conjunction with the other actions then pending in this Court, the primary reason urged by defendants in successfully requesting that this case be transferred to New York.

17. I might also point out that nowhere in their papers do defendants advance any ground for prejudice to the individual defendants (Coleman, Scott and Dunphy) other than the conclusory assertion that over the years "memories have faded." Even if these defendants' memories have faded, which I do not believe they have, in view of their continuous involvement in related litigation up through at least February of 1974 when I am informed a related action was settled on the eve of trial, the voluminous transcripts of their prior testimony before the Securities Exchange Commission, the American Stock Exchange and in depositions in other actions would, I respectfully suggest, supply a wealth of material to refresh their recollections. I turn now to the other points raised by defendants in support of their claim of prejudice.

Argent Corporation's Claim of Prejudice

18. As previously noted, Recrion Corporation (previously Parvin/Dohrmann) was merged into Argent Corporation following a tender offer in August of 1974. Mr. Barnes in his affidavit (¶ 18) contends that Argent Corporation, by reason of the upcoming trial ordered by this Court, is being deprived of its right to retain counsel of its choice and that even if his firm were to continue as counsel for Argent, its unfamiliarity with Argent personnel would hamper its attempt to defend this action.

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Motion to Dismiss*

19. Mr. Barnes nowhere explains what transaction involved herein Argent personnel might be able to shed some light on. Indeed, I would respectfully suggest that the extensive amount of work done by Mr. Barnes' firm in connection with the various litigations arising out of the transactions involved herein and his firm's admitted intimate familiarity with such transactions would make it most qualified to represent Argent's interests.*

20. Mr. Barnes also ignores the fact that Argent has now had over a month to retain counsel of its own choosing in that he as counsel of record for Parvin/Dohrmann was informed at the end of March of the pretrial conference to be held on April 3.

21. In paragraph 20 of his affidavit, Mr. Barnes refers to the change in personnel at Parvin/Dohrmann since this action was commenced. I merely wish to point out to the Court that as a result of the improprieties alleged in the complaint, defendant Coleman, who was the Chairman of Parvin/Dohrmann, and I believe Mr. Scott, who was president, resigned their positions in early 1970 and, according to information available to me, there was a complete change in management at that time. Thus, it would appear that all of the witnesses who Mr. Barnes claims are unavailable to Parvin/Dohrmann have been unavailable for approximately the last five years. And, Mr. Barnes does not explain what, if anything, prevents Messrs. Coleman and Scott, defendants herein and persons who obviously have the most firsthand knowledge of the transactions involved herein, from testifying at the trial.

* In this regard, I note that Ronald S. Daniels, Esq., a partner in the Townley, Updike firm, in an affidavit submitted to the Illinois Court in connection with the motion to transfer, detailed the work his firm had done and its familiarity with the transactions involved herein.

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22. Mr. Michael L. Lapin, Vice President and General Counsel of Argent, in addition to making some of the same points made by Mr. Barnes and referred to above, argues that in negotiating for the purchase of the common stock of Recrion Corporation, Argent "concluded, based on the prolonged four-year inactivity in this case . . . that plaintiffs herein had abandoned this action." I respectfully suggest to the Court that if indeed Argent made this assumption it was wholly unjustified. Surely, before assuming that a litigation seeking damages of \$2,500,000 has been abandoned, due diligence would require a phone call to check if this were the case. Surely, Argent did not obtain an opinion of counsel stating that this case had been abandoned.* In any event, I would respectfully suggest that if Argent viewed the alleged abandonment of this case as such an important factor in its negotiations, that a motion to dismiss for lack of prosecution should have been made prior to the tender offer.

Defendant FOF Proprietary Funds

23. It is suggested in defendants' moving papers that the management of FOF has changed throughout the years and that the former management of FOF which might have knowledge of the transactions involved herein is hostile to the present management of FOF and, therefore, their cooperation cannot be expected. In this connection I first note that according to all of the documents that I have seen, the transaction involved herein with respect to FOF, wherein plaintiff Finley purchased 30,000 shares

* I also note that according to material sent to Recrion stockholders Argent prior to the tender offer contracted to buy 421,844 shares of stock owned or controlled by Mr. Coleman. Mr. Lapin's affidavit is silent as to what if any arrangement was made between Argent and Coleman relating to the potential liability presented by this lawsuit. For all we know, Coleman agreed to indemnify Argent with respect to this liability.

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of restricted Parvin/Dohrmann stock from FOF, was handled exclusively by defendant Scott, Dunphy and Jesup & Lamont and that even the then management of FOF had no first-hand knowledge of the facts surrounding this transaction. In addition, it is a well-known fact that the hostility of FOF's former management was manifested in 1972 when the Securities and Exchange Commission commenced its action against Robert Vesco. Indeed, I believe that those connected with FOF in 1969 departed the scene in 1971 when Mr. Vesco gained control of the IOS complex which included FOF. There is therefore no merit to defendant's contention that any delay in this case has resulted in the unavailability of FOF personnel. Rather, it would appear that they were as unavailable in 1971 as they are today.

Defendants Dunphy and Jesup & Lamont

24. From documents available to me, as well as an affidavit submitted by Jerome J. Londin, Esq. in connection with the motion to transfer herein, it would appear that Mr. Londin's firm has represented Jesup & Lamont and its partners in connection with the transactions involved herein from at least early 1970. This included the representation of defendants Jesup & Lamont and John J. Dunphy as well as William P. Suter in an action entitled 20th Century Investors, Inc. v. Jesup & Lamont, et al. (70 Civ. 2597), which I am informed was settled in February of 1974. Yet defendants' counsel, especially Mr. Duff, Mr. Londin's partner, complains that defendants Dunphy and William P. Suter are no longer affiliated with the corporate successor of Jesup & Lamont and that Mr. Suter is a non-resident of the State of New York. Mr. Duff further states that he does not know whether Mr. Suter is subject to compulsory process of this Court or would be willing or able to appear voluntarily to testify at trial.

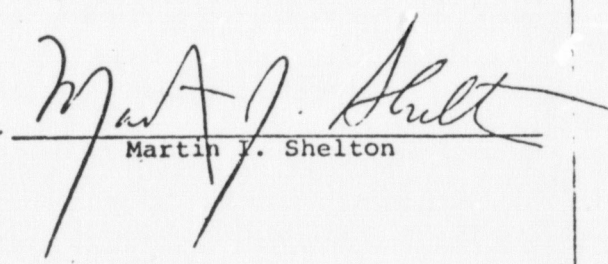
*Affidavit of Martin I. Shelton in Opposition to
Motion to Dismiss*

In this regard, I merely wish to inform the Court that my office, through a call made to Jesup & Lamont yesterday, learned that Mr. Suter is presently employed by Shaw & Co. at 120 Broadway, New York, New York, and was successful in serving Mr. Suter with a subpoena requiring his appearance at the trial on May 6.

* * *

25. In conclusion, although plaintiffs may not have taken any action to press this matter until it was called for pretrial conference in connection with the Court's program for the expedited disposition of civil cases pending for more than three years, it is equally clear that defendants likewise took no action. I respectfully submit that this fact as well as the other circumstances outlined above, requires the denial of the instant motion. In this connection, I respectfully refer the Court to §3216 of the New York Civil Practice Laws and Rules, which, although not binding on this Court, requires a defendant to take some affirmative action in demanding the resumption of prosecution of an action before it can be dismissed for lack of prosecution.

26. Finally, I would like to inform the Court that plaintiff is prepared to proceed to trial on May 6th and has over the past few days subpoenaed numerous witnesses and documents and expended a great deal of time and effort in order to prepare this case.


Martin I. Shelton

Sworn to before me this
2nd day of May, 1975

Notary Public

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EXHIBIT A

REC: Mr. Mail I. O'lton

file Finley Parvin/Dohrmann

CHARLES O. FINLEY & COMPANY, INC.

Correspondence

356.5

310 SOUTH MICHIGAN AVENUE

CHICAGO, ILLINOIS 60604

August 9, 1972

Telephone Area (312) 939-2475

Clerk of the United States District Court
United States Court House
Foley Square
New York, New York 10007

In re: Moseley v. Scott
69 CIV. 4574

Gentlemen:

During the period commencing October 11, 1968 and ending October 13, 1969, common stock of Parvin/Dohrmann Company (now Recrion Corporation) was purchased by the following persons in the following amounts:

Charles O. Finley 310 South Michigan Avenue Chicago, Illinois	31,000 shares
Charles O. Finley and Mrs. Shirley M. Finley 310 South Michigan Avenue Chicago, Illinois	1,000 "
Charles O. Finley & Company, Inc. 310 South Michigan Avenue Chicago, Illinois	5,000 "

The above named purchasers are parties plaintiff to the action entitled, Charles O. Finley, et al. vs. Parvin/Dohrmann Company, Inc., et al. (now pending in your Court as case number 70 CIV 4306), are pursuing their own rights and remedies regarding certain of the matters involved in the Moseley litigation, and desire to continue to act for their own behalf. Accordingly, on behalf of the above named purchasers, I hereby

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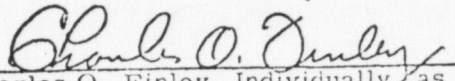
Exhibit A

- 2 -

request that they, and each of them, be excluded from the class referred to in the order dated June 28, 1972 and from the proposed settlement referred to in that order.

It is the desire of the above named purchasers that they not share in the benefits of any favorable judgment or settlement in the Moseley litigation and that they not be bound by any judgment entered therein.

Very truly yours,



Charles O. Finley, Individually, as
Agent for Shirley M. Finley, and
as President of Charles O. Finley
& Company, Inc.

Transcript of Hearing Before Honorable Inzer B. Wyatt,
May 2, 1975

MP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES O. FINLEY et al.,
Plaintiffs,
versus

PARVIN-DOHRMANN COMPANY, INC.,
DELBERT W. COLEMAN, WILLIAM C. SCOTT,
JESUP & LAMONT, JOHN J. DUNPHY and
F.O.F. PROPRIETARY FUNDS, LIMITED,
Defendants.

70 Civil 4306

New York, N. Y.

May 2, 1975 - 3:00 p.m.

Before

HON. INZER B. WYATT,

District Judge.

APPEARANCES:

SHEA, GOULD, CLIMENKO & KRAMER, Esqs.,
Attorneys for Plaintiffs

MARTIN I. SHELTON, Esq., and
DANIEL CARROLL, Esq., of Counsel

TOWNLEY, UPDIKE, CARTER & RODGERS, Esqs.,
Attorneys for Defendants Parvin-Dohrmann, Coleman
and Scott,

RICHARD J. BARNES, Esq., of Counsel

(Continued)

Appearances

1(a)

NP

APPEARANCES: (Continued)

CARRO, SPANBOCK, LONDIN, RODMAN & PASS, Esqs.,
Attorneys for Defendants Jesup & Lamont and Dunphy
REGINALD LEO DUFF, Esq., of Counsel

ROSENMAN, COLIN, KAYE, PETSCHER, FREUND & EMIL, Esqs.,
Attorneys for Proposed Intervening Defendant
JOEL W. STERNMAN, Esq., of Counsel

MILGRIM, THOMAJAN & JACOBS, Esqs.,
Attorneys for Defendant F. O. F. Proprietary Funds, Ltd.,
ROBERT A. MEISTER, Esq., of Counsel

MP

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THE CLERK: Finley versus Parvin-Dohrmann.

THE COURT: All right. What is the motion before me in Finley against Parvin Dohrmann?

MR. SHELTON: Your Honor, I think it is a motion to dismiss for lack of prosecution.

THE COURT: All right. I will hear the movants.

MR. BARNES: Your Honor, I am Richard J. Barnes, a member of the firm of Townley, Updike, Carter & Rodgers, and I appear on behalf of defendants Parvin-Dohrmann & Co. and Coleman and Scott, three of the named defendants.

Your Honor, the issues posed by this motion are quite simple. The legal principles involved are certainly quite simple and straightforward. The facts are not complex, and they are not controverted, and I submit to your Honor what normally would be my conclusion, and I will start with it, that in my judgment proper application of the law and the facts here leads to the conclusion that it would be, in my judgment, a gross abuse of discretion if your Honor were to deny this motion and require this case to go to trial, now or at any time.

THE COURT: Well, Mr. Barnes, the trouble is that under the system which has obtained in this court for certainly the last two years, I suppose, what could the plaintiff have done to get this case tried?

MR. BARNES: Take discovery, to start with, sir.

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2 THE COURT: Of course, I am not going to allow any
3 discovery. But suppose he says, "I don't want any discovery."
4 I don't have any discovery motion before me. Of course, he
5 is not going to have any discovery. He tells me, "I don't
6 want any discovery. I just want to try it."

7 MR. BARNES: May I address myself to that question?

8 THE COURT: Of course. That is why I asked you.

9 MR. BARNES: I think the Court could take judicial
10 notice -- I don't know whether you have ever seen the complaint
11 in this action.

12 THE COURT: No; I haven't.

13 MR. BARNES: I think it runs into thirty or some
14 thirty-five pages. It involves facts, events that occurred
15 six years ago, and very complex facts that occurred over a
16 period of time. It raises complex problems under the securities
17 laws.

18 You can take judicial notice that a plaintiff in a
19 case like this has to take extensive discovery to go to trial.
20 If not, if you don't want to take judicial notice, I can show
21 you a stack of paper that represents notices to produce and
22 notices of deposition that were never followed through on and
23 were abandoned, and now, one week or two weeks ago, when this
24 case was called for a pre-trial conference, at the last minute,
25 plaintiff served us with this batch of papers, which, by the

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2 way, your Honor, were obviously run off on an MTST machine,
3 because they are identical to the papers served in 1971.

4 So if you are reluctant to take judicial notice that
5 a plaintiff in a case as complex as this does need discovery
6 but does nothing until a very late hour to seek it, the evi-
7 dence there is that they felt they needed discovery but now
8 it is too late.

9 THE COURT: I am not dealing with discovery now. I
10 will not permit discovery. There is no problem about that.
11 I won't permit it. There will be no discovery.

12 MR. BARNES: But, your Honor --

13 THE COURT: They are finished as far as discovery
14 is concerned.

15 Look: I cannot deny them a trial, because I am
16 asking you, Mr. Barnes -- you see, in the old days, you had
17 a system which I think was something like the State Court
18 system. You had to notice a case for trial, and if you did
19 not notice a case for trial or file a note of issue, then
20 that was a default, an omission, and you could understandably
21 move to dismiss for failure to file a note of issue. But
22 under what I regard as a stupid and a vicious system, as I
23 have said many times from this bench but which I am powerless
24 to do anything to prevent, under the present system plaintiff
25 does not have to file any note of issue, and what I am con-

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2 cerned about is, what could this plaintiff have done since the
3 present system was in effect to get a trial?

4 MR. BARNES: It could have sought a trial from the
5 Judge to whom the case was assigned. Otherwise, your Honor
6 is saying that we are writing Rule 41(b) off the books in this
7 Circuit.

8 THE COURT: In effect, that is exactly what the pre-
9 sent system has done.

10 MR. BARNES: With all due respect, I don't think
11 this court -- and I don't mean you, your Honor; I mean this
12 system here -- I don't think it is empowered to write Rule
13 41(b) off the books, and the cases that we have cited in our
14 brief --

15 THE COURT: 41(b) is failure to prosecute?

16 MR. BARNES: Yes.

17 THE COURT: But there is no procedure in this
18 court at the moment for any plaintiff to get a trial; don't
19 you understand?

20 MR. BARNES: Your Honor, there is a procedure.

21 THE COURT: How?

22 MR. BARNES: There was a procedure in one of the
23 cases that stemmed out of this thing. There was an attorney
24 who kept barraging the judge --

25 THE COURT: Certainly, I don't want to make any

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ruling today that will enable litigants to come around all day barraging me for trials. I am taking the cases just as fast as I can.

MR. BARNES: But, your Honor, this is a case that has sat around for five years, and nothing has happened --

THE COURT: But I am trying to ask you: what could they have done to get a trial?

MR. BARNES: I gave you one answer. You write a letter to the Judge and say, "Your Honor, we are ready to go to trial."

THE COURT: Oh, no. That I can't accept.

MR. BARNES: What choice is the defendant left with, your Honor? When does he move to dismiss for failure to prosecute? When you call the case, and then you are made to realize that five years have elapsed, that the defendants have been prejudiced?

This Circuit has said a defendant is not required to show prejudice. Prejudice, impairment to its defenses is presumed as a matter of law. The only time a court in this Circuit has had to consider the matter of prejudice to the defendants is when the plaintiff comes in with excusable negligence. Here we don't even have that.

Your Honor, it just seems to me what you are saying is, you are making inoperative -- and I know that is a word

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2 that is not highly thought of any more -- you are making in-
3 operative a very --

4 THE COURT: Well, at this point in time --

5 MR. BARNES: It's not too bad any more, I suppose.

6 Your Honor, that rule would just be written off the
7 books, and every defendant in a case in the Southern District
8 of New York would not have the same rights.

9 And, very important, this isn't a procedural tool or
10 tactic. You read the cases, and you will see that. The
11 defendants in this court do not have what defendants in every
12 other court in the United States have, and if that doesn't
13 violate the equal protection under law doctrine or due process
14 or something, I don't know what does.

15 THE COURT: Well, for one thing, the defendants
16 didn't come forward and make a motion to dismiss until after
17 the court, as an institution, stirred up this sediment. In
18 other words, as I view it, if the court as an institution had
19 done absolutely nothing, this case would have slumbered on for
20 five or six more years. But because of what seems to me a
21 mistaken and misguided notion that in order to comply with
22 our master, the computer, we have got to manufacture statistics
23 of cases disposed of, because we've got to do that we stirred
24 it all up.

25 We initiated this program, and the case was re-

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2 assigned to me, and I asked Magistrate Schreiber to help me,
3 and he got after the parties, and then suddenly the defendants
4 decided to make this motion.

5 MR. BARNES: Okay, but, your Honor, --

6 THE COURT: And, of course, from my selfish stand-
7 point, I would love to be able to grant it.

8 MR. BARNES: May I address myself to that point?
9 It seems to me, your Honor has what I thought is a conceptual
10 problem that Magistrate Schreiber had before he made his
11 recommendation that this case should be dismissed, and I
12 would like to emphasize something we said in our papers. I
13 was there, and I don't recall Magistrate Schreiber saying he
14 recommended that the case should probably be dismissed, and
15 our notes do not reflect he used that word.

16 THE COURT: No, but the stenographic transcript
17 reflects it.

18 MR. BARNES: If he used that word or added it
19 later on, I strongly urge it was out of deference to your
20 Honor's role and discretion to dismiss the case, not the
21 Magistrate's.

22 But Magistrate Schreiber had the same conceptual
23 problem. He said if we had moved this case be dismissed
24 six months or a year ago under 41(b), he would have no question
25 in his mind that any judge in this District would have dis-

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2 missed the case.

3 But he had the same conceptual problem, and now we
4 are here, and we have this crash program.

5 Now, it is true this crash program -- to get rid of
6 cases over three years old -- has a very salutary purpose and
7 objective. One of the objectives cannot be, however --

8 THE COURT: Well, I don't happen to think so.

9 MR. BARNES: Fine. I won't take issue with your
10 Honor on that, but whatever its objectives, one of the object-
11 ives cannot be to repeal Rule 41(b).

12 Secondly, if what the Second Circuit says is true,
13 that the only operative fact in considering a motion under
14 Rule 41(b) is that there has been a lack of due diligence, the
15 fact that Judge Edelstein and the other judges decided to
16 bring all these cases up at once can't change that legal prin-
17 ciple or change the fact that there has been a case that has
18 been dormant for five years.

19 THE COURT: Mr. Barnes, I don't think we can ever
20 overcome my logical difficulty here and that is, under the
21 present system, the reason that there hasn't been a trial of
22 this action is not attributable to the plaintiff; it is at-
23 tributable to the institution.

24 If we were talking about discovery, there would be
25 no problem at all. There is no question there will be no dis-

cover by the plaintiff.

MR. BARNES: Your Honor --

THE COURT: But if the plaintiff says, "I want a trial," I just don't see how, despite my personal inclination, how I can deny the plaintiff a trial.

MR. BARNES: And --

THE COURT: Because it hasn't been the plaintiff's fault. It is because we have no mechanism by which a plaintiff can ask for a trial.

MR. BARNES: What you are saying is that it isn't the plaintiff's fault because he hasn't got a trial up to this point in time.

THE COURT: That's right.

MR. BARNES: You are not assuming that the plaintiff didn't abandon this case? How can you possibly feel that this plaintiff, Mr. Finley, intended to prosecute this case and that we should have been getting ready to defend it when he did absolutely nothing in a \$3,000,000 securities case?

THE COURT: Well, if you are asking for an adjournment of the trial, that would be --

MR. BARNES: I am not, your Honor. It is late, too late for that. This case should not be tried tomorrow or six months from now. We don't know what their legal theories are. We don't know what they have abandoned.

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2 THE COURT: That is their hard luck, not yours.

3 MR. BARNES: We have witnesses who are not under our
4 control, who are hostile, who are dead, some of them. There
5 are eight brokerage houses involved in this. Their employees
6 are gone. God knows in what condition or where their records
7 are.

8 If this was a plaintiff who had the facilities or
9 the money to prosecute the case, if he had done something, we
10 would have been doing something right along. He had no inten-
11 tion of prosecuting this case. He was waiting for something
12 to happen. He was waiting for something to happen, and it
13 has happened: a year ago, when he got all his money back.

14 You are saying that he couldn't do anything up to
15 this time. This was called for a pre-trial conference on
16 April 3rd. Over two weeks later I asked Mr. Carroll -- having
17 asked him on April 3rd, "Will you please find out from Mr.
18 Finley whether he tendered his stock for \$83 in cash, having
19 paid \$90 for it" -- on April 3rd I asked him that, and over
20 two weeks later I asked him the question, and he said, "We
21 haven't been able to get hold of Mr. Finley. He hasn't re-
22 turned our call."

23 Does that sound like a plaintiff who is anxious to
24 come in here and take up your Honor's time and our time in a
25 very complicated securities case, or does it sound like

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2 somebody who is trying to call our bluff right up to the
3 courthouse steps and trying to get a settlement out of it?
4 I don't think we or the Court should be used that way.

5 THE COURT: Well, I wish I could see some way to
6 grant your motion. Nobody wants to grant a motion more than
7 I want to grant yours, but I have thought about it, and I
8 just don't see how I can deny a trial to a plaintiff who
9 wants a trial, in a case where it is not his fault that he
10 hasn't gotten a trial.

11 MR. BARNES: And if we had been called in five years
12 from now, so it would be ten years since the filing of the
13 suit, then your Honor would take the same position?

14 THE COURT: I think so.

15 MR. BARNES: Then there is no Rule 41(b) in this
16 Circuit.

17 THE COURT: There isn't, under the present system,
18 but apparently the system has some possibility of working,
19 because this present program was instituted to bring in all
20 these cases over three years old, and that is how this got
21 dredged up.

22 MR. BARNES: But if discovery is completed and
23 somebody says, "I need one more deposition," that is one thing,
24 and those cases should not be penalized by this new system
25 that the Court has instituted. I agree. But how many cases

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2 are you going to have where you have a \$2,500,000, complex
3 securities case, where nothing has happened for five years?
4 Do you have that many such cases on your calendar?

5 The cases that you are talking about, your Honor,
6 those three-year-old cases, sure, they should be pushed to
7 trial, and there are probably a lot of plaintiffs who are
8 waiting anxiously for trial. This is not one such plaintiff.

9 THE COURT: I know, but I can't read the minds
10 of all the plaintiffs and know how many of them --

11 MR. BARNES: You don't have to. How many motions
12 have you had like this? This program was announced two months
13 ago. How many such motions have you had?

14 THE COURT: Well, I know you feel put upon and
15 vehement, but I don't see how I can refuse to give this man a
16 trial.

17 Does the plaintiff want a trial?

18 MR. SHELTON: Yes, your Honor.

19 THE COURT: You realize the plaintiff will have no
20 discovery?

21 MR. SHELTON: Yes, your Honor.

22 THE COURT: No discovery.

23 MR. SHELTON: Yes, your Honor.

24 MR. BARNES: And the defendants will have no dis-
25 covery?

THE COURT: The defendants? No; certainly not.

MR. MEISTER: Your Honor, I am Robert A. Meister, of the firm of Milgrim, Thomajan & Jacobs, representing F.O.F. Proprietary Funds, Ltd.

May I be heard on this, because I think the motion of my clients as a moving party is perhaps even stronger, in that people are dispersed, people are dead, and now for the first time I find out in plaintiff's response papers sections in which he contends that my client didn't have any direct contact, when there are these ten different paragraphs of the complaint which allege that my client intended something or my client represented something or my client knew something.

Your Honor, I represent F.O.F. Proprietary Funds, Ltd. F.O.F. --

THE COURT: What motion are you arguing?

MR. MEISTER: I am arguing the motion to dismiss.

THE COURT: I am not going to dismiss it.

MR. MEISTER: I would like your Honor to give me five minutes so your Honor can appreciate the prejudice to my client.

F.O.F. Was a wholly-owned subsidiary of the Fund of Funds, which in 1971 came under the control of and was raped by Robert Vesco. It is now under the control of a Canadian court-appointed liquidator, and my firm was asked by

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the liquidator to come in in December 1973.

Almost immediately thereafter, I wrote a letter to the two judges who had this case and another case involving various circumstances, asking that the two cases be consolidated. Plaintiffs in this case never responded to that letter. The cases were not consolidated, because the other case was settled.

In the interim, since that event, in 1974, Edward Cowett, who I understand was the president of F.O.F. Proprietary in 1968 and 1969, when these events occurred, died. He died in 1974. According to an indictment filed in this court in the case of United States versus John M. King et al., the number of which I don't have, but I could supply to your Honor's chambers, if your Honor would think it relevant, Mr. Cowett was the chief executive officer. Mr. Cowett was the man who could have testified as to what F.O.F.'s intention was when it bought the stock and when it sold the stock.

Now, as I understand their complaint, their complaint proceeds against us on a theory that we had a duty to register because at the time we purchased our stock, we should have known and in fact did know that we were not proper stockholders under some Nevada regulation or ordinance and therefore that we would have to sell our stock in Parvin-Dohrmann very quickly.

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I can't find anything, your Honor, in Nevada law which would give me the slightest inclination of why we should have known.

I had a conversation yesterday with the deputy Attorney General out there, and he can't help me.

But how am I going to prove what our intention was, what we knew, with Mr. Cowett being dead? Now, this, it seems to me, your Honor, is the very circumstance which was presented to the Court of Appeals of this Circuit in 1965 in the Treadway versus Chrysler case.

THE COURT: That was before the present system went into effect.

MR. MEISTER: But, your Honor, there is more to progress than getting a trial.

THE COURT: Not for present purposes, there isn't. I have already said there will be no discovery -- period.

MR. MEISTER: That, your Honor, I appreciate, but it doesn't get me my witness back alive. I am prejudiced because they abandoned the case, and they didn't do anything.

THE COURT: I suppose you've got a suit under Section 1983 against the Court. But how can I say to this plaintiff, "You are dismissed because judges of this court have not brought you in and set the case down for trial"?

MR. MEISTER: I think the way the Second Circuit did

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2 in 1965 --

3 THE COURT: I said that was before this present
4 system. In those days --

5 MR. MEISTER: I would also suggest, your Honor,
6 that the plaintiff's lack of diligence lies not merely in not
7 bringing the case to trial. It is in not doing anything.
8 They never noticed my deposition until two weeks ago.

9 THE COURT: So what? So they don't get to take any
10 depositions. They don't get to submit any interrogatories or
11 get any answers to interrogatories. They don't get anything.

12 MR. MEISTER: And the defendants had a right to
13 think -- before the computer -- that this case, filed by well-
14 known litigants, had been abandoned. Plaintiff knows how to
15 prosecute a case, and if he were interested in this case he
16 would have, and meanwhile, all of my witnesses are dispersed.
17 Some are down in Costa Rica, I presume. Most of them are at
18 the far ends of the world. After all, we didn't do business
19 in the United States. How am I going to try the case? I
20 could have done it before if they had started, because I could
21 have taken depositions.

22 MR. BARNES: Your Honor, there is one case that I
23 think you should recall, in the Second Circuit, where a motion
24 was made in the middle of discovery, before trial, to dismiss
25 for failure to prosecute, and there was a judgment for

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2 plaintiff on the merits, and the Second Circuit after trial
3 held that it was an abuse of discretion for Judge Ryan, in
4 this case, to have denied that motion prior to trial, for
5 failure to prosecute, and there they were in the middle of
6 depositions.

7 It seems to me that that answers the problem you
8 have, your Honor, about these people not having an opportunity
9 to get the trial.

10 MR. DUFF: I am Reginald Leo Duff, your Honor, of
11 the firm of Carro, Spanbock, Londin, Rodman & Fass, represent-
12 ing defendants Jessup and Lamont and Dunphy.

13 Your Honor has denied discovery by all parties, and
14 I think that is entirely appropriate in the present circum-
15 stances, except for this fact:

16 Most of the defendants, I think, with the exception
17 of F.O.F. Proprietary Funds were subjected to investigation
18 by the American Stock Exchange and by the Securities & Exchange
19 Commission. Their testimony has been taken in circumstances
20 under which I expect, your Honor, if the law will support me,
21 and subject to my Rule 11 obligation, shortly to move to quash
22 the subpoena for those transcripts.

23 The plaintiff, although he has done nothing these
24 five years, may have had access to our testimony under circum-
25 stances not protected by the presence of counsel or the other

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2 protections which depositions would have afforded those
3 clients.

4 On the other hand, we learned today that in his pur-
5 chase of his private placement stock in 1969, plaintiff
6 borrowed the entire purchase price, which seemed to me to be
7 a clear violation of Reg. T or Reg. U, and it seems that this
8 is justification for the inaction for five years, and we are
9 not going to be allowed to have discovery. We do not even
10 know how much damage he has had.

11 We understand that in an SEC proceeding, settled
12 two years ago, securities were given to all stockholders of
13 record in July of 1969, of which plaintiff was one, and those
14 securities have been valued at approximately a dollar a share.
15 Now, that represents roughly one half of the damages claimed
16 on this private placement.

17 We have no access to those facts, because your Honor
18 will give discovery neither to us, who have perhaps foolishly
19 but neverthelsss relied on what we deemed to be an abandonment
20 in this case, nor to the plaintiff unless you quash the
21 subpoena, plaintiff doesn't need discovery. He can cross-
22 examine us on otherwise inadmissible questioning.

23 THE COURT: Has there been a motion before this
24 afternoon to quash certain subpoenas?

25 MR. DUFF: No. I am simply advising your Honor

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2 that I have such a motion under advisement.

3 THE COURT: I will have to deal with it when I come
4 to it.

5 MR. DUFF: There is an inequity here.

6 MR. STERNMAN: Your Honor, I am Joel W. Sternman,
7 of the firm of Rosenman, Colin, Kaye, Petschek, Freund &
8 Emil, and I am appearing here for a proposed intervening de-
9 fendant, Argent Corporation, which is the successor in inter-
10 est to Parvin-Dorhmann Corporation.

11 Your Honor, I have with me in court today Mr. Byman,
12 from Chicago, who represents the Argent Corporation. If I
13 could have your permission, your Honor, I would like to have
14 him admitted for the purpose of this argument -- I would move
15 his admission for this purpose?

16 THE COURT: His firm have some motions they would
17 like to put on?

18 MR. STERNMAN: Yes, your Honor.

19 THE COURT: Shouldn't I get rid of the motions that
20 I already have before me?

21 MR. STERNMAN: Well, your Honor, Argent is in a
22 position to be helpful on this --

23 THE COURT: No. I don't think I want to hear any
24 thing more about discovery. Now, let's see --

25 MR. STERNMAN: Will we be able to speak to the Court

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2 following your other rulings, your Honor?

3 THE COURT: Of course.

4 MR. BARNES: Your Honor, before you pass on to the
5 next one -- and I confess I am not sure of the procedure here
6 -- but in view of the fact that we might not have much time,
7 I wonder if we could submit to your Honor a proposed order
8 which would contain a Section 1292(b) certification. I think
9 this has a very significant impact on our case and that we,
10 of course, believe that a trial in this action, which could go
11 on for an extended period of time and might turn out to be a
12 total waste of time, in view of the fact that a decision by
13 the Second Circuit might have some impact on this new procedure
14 that the Court has adopted for civil cases three years old
15 and older, I think it might be appropriate if we could get
16 some kind of expedited proceeding before the Second Circuit.

17 THE COURT: Well, let me face that in due time.

18 MR. DUFF: May I join in that?

19 THE COURT: Yes

20 MR. MEISTER: May I join in that?

21 THE COURT: Yes. Let me first dispose of the
22 pending motions.

23 You understand that as I have attempted to make
24 clear, I want to grant the motion to dismiss for lack of
25 prosecution, and the only reason that I am not going to do

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it is because I do not see what the plaintiff could have done during this period to get a trial under the present rules of this court.

Therefore, Mr. Clerk, I have endorsed this motion by Mr. Barnes' firm: "After hearing in open court, the within motion is denied for the reasons given in open court. So ordered."

Now, Mr. Shelton's affidavit, which appears to be an original, is to be filed, and I ask that it be filed and docketed.

Now, was there a motion by one of the other defendants?

MR. DUFF: Your Honor denied the motion.

MR. SHELTON: Your Honor, may I just say one thing --

THE COURT: Well, I have just denied the motion. What do you want to say about it?

MR. SHELTON: I will sit down.

MR. MEISTER: Do I understand that your Honor has acted on our request for a 1292(b) certification?

THE COURT: I am just acting on the motion to dismiss for failure to prosecute.

MR. BARNES: There has been a joint motion.

THE COURT: All right. So, having disposed of this

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2 motion, I have disposed of every piece of business before me
3 for the moment.

4 Now, what about the 1292(b) motion, Mr. Barnes?
5 Were you going to ask me for that?

6 MR. BARNES: Yes, your Honor. Again, on behalf of
7 the co-defendants, I think we would jointly want to ask your
8 Honor for such a certification, and --

9 THE COURT: Does the plaintiff have anything to say
10 about that?

11 MR. SHELTON: Well, your Honor, for the reasons
12 expressed in my answering affidavit, I don't think that this
13 is a case of such dismal neglect. We are prepared to go to
14 trial. We have our evidence. We have subpoenaed witnesses,
15 eight witnesses for Tuesday. We are ready to move. We don't
16 think there should be a certification in this particular case.
17 I see no real question of law that is presented to the Court.

18 THE COURT: The difficult is that I am afraid we
19 aren't going to be able to have a trial shortly, anyway, be-
20 cause, as I think I told you when we were here before, my
21 assignment for the next two weeks is to the emergency part.

22 MR. SHELTON: Yes, your Honor.

23 THE COURT: And that sits in Room 506, and I have
24 learned, to my dismay, that Room 506 has no jury room, and we
25 then investigated to see whether on the fifth floor there was

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2 any other room that we could use as a jury room, and there
3 isn't any other room that I can use.

4 MR. SHELTON: All right, your Honor.

5 THE COURT: So I can't make bricks without straw.

6 MR. SHELTON: I would say to your Honor that in con-
7 versations with Magistrate Schreiber, my client was willing to
8 waive a jury. I think Mr. Duff's client was willing to waive
9 a jury. I think F. O. F. was. I think Mr. Barnes told me
10 that on behalf of his two remaining clients he is willing to
11 waive a jury.

12 So there is only one client, as I understand it,
13 that is left who needs a jury, if the new counsel is to come
14 into the case.

15 THE COURT: Well, is it to be a jury case or non-
16 jury case?

17 MR. SHELTON: I don't know, your Honor. It could go
18 either way.

19 MR. STERNMAN: Your Honor, that is one of the issues
20 I was going to raise. I wonder now if Mr. Byman could ad-
21 dress himself to that issue.

22 THE COURT: Of course.

23 MR. BYMAN: Your Honor, I am Robert Byman.

24 With respect to the issue of a jury, your Honor, we
25 have basically the same position that we have with all of the

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2 issues in this case.

3 We learned of this case for the first time on
4 Tuesday of this week. We have not had the chance to make an
5 intelligent decision with our clients as to what we should do
6 with any of the issues in this case. The primary thing, your
7 Honor -- the jury aside, or the trial aside -- is the question
8 of your ruling on discovery.

9 We think that the discovery ruling should be differ-
10 ent as to Argent Corporation, the people whom we represent.
11 Argent Corporation, your Honor, did not exist until April of
12 1974. In August of 1974, Parvin-Dohrmann, the defendant in
13 this suit, was merged into Argent Corporation.

14 At that time, Argent was told and relied upon repre-
15 sentations that this case was dormant, and so while the other
16 defendants may not have taken discovery and may be bound by
17 that decision over the course of the last five years, Argent
18 Corporation has never had an opportunity for discovery. We
19 do not know anything about the issues of this case. Therefore,
20 we are not ready at this point to make a decision about the
21 jury issue.

22 We also respectfully urge your Honor that we should
23 be allowed to take some minimal amount of discovery, and to
24 that end we are willing to work on any expedited discovery
25 you would suggest. We would take Mr. Finley's deposition on

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2 Monday and serve a limited number of interrogatories, and
3 I have a notice of deposition and a proposed form of interro-
4 gatories here today, and I can file them this afternoon.

5 THE COURT: There will be no discovery. That is the
6 end of that.

7 MR. DUFF: Your Honor, may I be heard on the 1292(b)
8 application?

9 MR. BYMAN: Your Honor, before we get any further,
10 we would like to know what sort of official status we will
11 have in this case. We would like to move, on behalf of
12 Argent Corporation -- we have a memorandum in support thereof
13 and our first pleadings, if your Honor will allow us to file
14 them and serve them to counsel in open court.

5 MR. SHELTON: May I ask your Honor: I am a little
6 confused. Does Mr. Barnes' firm still represent Parvin-
7 Dohrmann, Inc.?

8 THE COURT: I haven't the slightest idea.

9 MR. BYMAN: Your Honor, if you would allow me to
0 state why we are asking for leave to intervene, it is that
1 Parvin-Dohrmann, now Argent Corporation, has some conflict
2 of interest between it and other defendants who are represented
3 by Mr. Barnes' firm. Mr. Coleman, who is one of the individ-
4 ual defendants, was the control stockholder, as I understand
5 it, of Parvin-Dohrmann Corporation. He was one of the people

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2 involved in the sale of Parvin-Dohrmann's shares during a
3 tender offer to the Argent Corporation. There are a number of
4 interests concerning which the two could be at loggerheads.

5 Argent, therefore, cannot be effectively represented
6 without a conflict of interest arising by Mr. Barnes' firm,
7 and Mr. Barnes has conceded that point in his affidavit.

8 As far as I know, Mr. Barnes has no objection to
9 withdrawing his appearance and to allowing us to intervene,
10 or whatever other procedure your Honor would permit, but to
11 prevent our firm's being allowed to intervene would deprive
12 Argent of any effective representation in these proceedings.

13 THE COURT: Who is Argent Corporation, and why do
14 they want to be a defendant?

15 MR. BYMAN: As I attempted to explain earlier, in
16 1974 Argent was incorporated in the State of Delaware. Short-
17 ly thereafter, they made a tender offer for Parvin-Dohrmann
18 shares. The tender offer was successful. We acquired 94 per
19 cent of the shares during the tender offer, and on August 27,
20 1974, Parvin-Dohrmann was merged into Argent Corporation.
21 So Parvin-Dohrmann no longer exists.

22 Argent Corporation, if any liability does exist
23 against Parvin-Dohrmann, has probably inherited that liability
24 as a result of the merger. Therefore, Argent seeks to be re-
25 presented in this action, and, as I stated before, Argent has

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2 a serious problem with the continued representation of its
3 interests in these proceedings by Mr. Barnes' firm, because
4 of the conflict of interest of these defendants as individual
5 defendants and --

6 THE COURT: Why don't you appear for Parvin-Dohrmann?
7 I don't know why I should complicate the case by getting some
8 new corporate entity like Argent Corporation in it.

9 MR. BYMAN: Your Honor, we are a new corporate
10 entity. We did not exist when these allegations were made.

11 THE COURT: Why didn't you come in a long time ago,
12 then?

13 MR. BYMAN: Because of the same reasons urged in the
14 42(b) motion. We were under the impression that this case
15 was dormant.

16 THE COURT: Well, that's no excuse. I am not inter-
17 ested in Argent Corporation.

18 MR. BYMAN: Will you allow us to appear for Parvin-
19 Dohrmann?

20 THE COURT: Well, I can't prevent you. Do you
21 need my approval? Certainly, I will permit a substitution of
22 counsel. Do you mean that Parvin-Dohrman wants to appear by
23 your firm instead of Mr. Barnes' firm?

24 MR. BYMAN: That's right, your Honor.

25 THE COURT: Does anybody have any objection to that?

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2 I have no objection to it -- certainly not -- but I want to
3 make it just as simple as possible, and I see no reason what-
4 ever to have the Argent Corporation in the case.

5 MR. BYMAN: May we have leave to file appropriate
6 papers next week to effect that substitution?

7 THE COURT: The only appropriate papers, I suppose,
8 would be just a substitution of counsel.

9 MR. BYMAN: I happen to have such a form in front
10 of me.

11 THE COURT: It is perfectly all right with me. I
12 won't make any trouble about it.

13 Now, let's see about a time for trial.

14 MR. MEISTER: Your Honor, before we reach that,
15 may I understand whether your Honor is ruling on our joint
16 request for certification?

17 THE COURT: No; I haven't come to that yet. I will
18 do that as soon as I can.

19 I guess we will have to try this case on August
20 the 11th.

21 MR. MEISTER: Your Honor, just on a point of personal
22 privilege, is there the slightest chance that we could make
23 it some other time, and if your Honor wants, I will state my
24 personal reasons.

25 THE COURT: No. I am sorry, but I can't do it any

1 other time. I have been looking at my calendar. It's too
2 bad. I had hoped that we could do it next week. I have told
3 you why we can't. I am trying to make the best adjustment
4 that I can.
5

6 All right, we will try it beginning on August 11th,
7 in Room 518.

8 Now, about the 1292(b) motion.

9 MR. MEISTER: Yes, your Honor.

10 MR. DUFF: Your Honor, may I address myself to
11 that?

12 THE COURT: Yes; of course.

13 MR. DUFF: I don't have the statute before me, but
14 my recollection of it --

15 THE COURT: Wait. I will take a look at it.

16 All right. I have just read the statute.

17 MR. DUFF: I submit, your Honor, respectfully, that
18 there is a controlling question here, subject to the recommen-
19 dation of Magistrate Schreiber and your Honor's exposition this
20 afternoon in open court. There seems to us to be a desire
21 on the part of the Magistrate to recommend, consonant with his
22 responsibility and your Honor's responsibility in an action
23 dormant this long, for whatever reason and whether or not
24 the plaintiff had available to him the ability to put this case
25 on the calendar, that this case should be dismissed.

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2 The Magistrate did, off the record, largely confirm
3 our views, that he was deferring -- I don't want to bind him
4 by off-the-record remarks. Your Honor has been quite explicit
5 in stating that there is nothing that you would desire more
6 than to dismiss the case if you thought you could but that
7 the Second Circuit authorities cited to you by Mr. Barnes
8 antedated the new crash program.

9 THE COURT: No; not the new crash program. The
10 individual assignment system. Because although my memory is
11 not good, I think under the system antedating the individual
12 assignment system, I think that cases got on the trial calendar
13 by the filing of a note of issue.

14 MR. DUFF: I so understand.

15 THE COURT: And if plaintiff failed to file a note
16 of issue, then that could trigger certain consequences.

17 MR. DUFF: Your Honor is absolutely correct.

18 THE COURT: But under the present system, I don't
19 see any substitute for the filing of a note of issue, and it
20 is for that reason that I don't find any way that I can fairly
21 throw the plaintiff out. That is my point.

22 MR. DUFF: I have understood your Honor's ruling to
23 be that.

24 I might observe that this appears to be one of those
25 cases that fell in the hiatus between current cases and old

cases that weren't computerized, that when it took all 1970 cases that were not assigned under the pilot program without any filing of any paper, the case immediately came out of the general calendar and got put on some judge's docket.

So any filing of any document, as a matter of fact -- as a matter of fact, I believe Mr. Meiner's appearance here in substitution did trigger the assignment at least temporarily, to Judge Stewart, of this case.

Now, be that as it may, I have read your Honor's decision, and if I am wrong, then perhaps the argument is not as strong as one of either inability to determine when for purposes of 41(b) there is non-prosecution, which is an implied repeal of the rule or a belief that the Court lacks power to dismiss under 41(b) in the circumstances of the individual calendar system.

THE COURT: No; it is not lack of power. It is that I don't think I can fairly deny the plaintiff a trial. Suppose he had no machinery to urge a trial other than, as has been suggested, harassing and bedeviling the judge to get a trial. I don't think plaintiffs out to be required to do that.

MR. DUFF: Your Honor, lawyers both in the State Court, before the adoption of the statute, and in this court have always been quite resourceful when the interests of their clients cried out for a speedy trial in bringing to the Court's

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2 attention reasons why the case might be moved up beyond its
3 normal place on the calendar.

4 I might observe, your Honor, that those cases that
5 have in this court been assigned to a particular judge, either
6 because they are started and assigned immediately or because
7 they were re-assigned prior to 1969 -- customarily, the
8 courts -- and I am sure your Honor does this as well -- take
9 the oldest ones and force them out quite apart from any
10 crash program.

11 So I think the fault here was simply not getting it
12 assigned to a judge and on somebody's calendar where somebody
13 could watch it.

14 I know under the old pilot program, for instance
15 with a case assigned to Judge Pollack, you were called up on
16 a fairly regular basis and questioned as to where the case was
17 going and what has been done since the last meeting, and there
18 was no need for a notice of readiness there.

19 Your Honor, on the other aspects of 1292(b) that
20 may materially advance the determination of the litigation,
21 your Honor has set us down for August 11th, and so far as I
22 know, I have no conflict. I might observe, though, that there
23 are other judges in this court who have the same pressures
24 that your Honor has in this case. I know that Judge Knapp is
25 about to send me out at the end of June. That is not, of

1 course, a conflict at this point. There may be conflicts yet
2 developing. We have no assurance this case is going to be tri
3 on August the 11th, however much we are prepared to accede
4 to your Honor's mandate.
5

6 I submit that the record in this case, in this
7 present case, is so skimpy and the issue is so straightforward
8 that this case could be appealed, assuming the Second Circuit
9 grants permission, because, after all, you are only certifying
10 the importance of the question; the decision is for the Court
11 of Appeals -- I believe that that issue could be presented in
12 its raw and naked splendor and we could get a decision one
13 way or the other, and it might take some pressure off the
14 District bench, because I think your Honor is reading the
15 directive to mean to try cases, whereas I think it is to
16 dispose of cases which are not prosecuted, so that you can
17 force the parties to trial or dismiss for non-prosecution.

18 The issue, of course, is, how do you determine non-
19 prosecution? That is the issue which should be certified.

20 MR. MEISTER: I would just add two points to that
21 request. First, I believe, if memory serves me readily, the
22 individual calendar system came into effect January 1, 1973,
23 and plaintiff had failed to prosecute that case for a con-
24 siderable period of time prior thereto. So plaintiff could
25 have placed it on the calendar prior to then, even under the

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2 old system, and I think the controlling issue of law is
3 whether under the circumstance of this case the Court is
4 powerless to do what is the correct thing, which your Honor
5 wants to do and which Magistrate Schreiber indicated he would
6 do, merely because of a change of rules.

7 MR. SHELTON: May I say something?

8 THE COURT: Yes; of course. Just on the question
9 of whether I should or should not give the certification.

10 MR. SHELTON: Well, in support of the application,
11 counsel has been continually referring to Magistrate Schreiber
12 recommendation and your Honor's own views. I don't think
13 Magistrate Schreiber has ever made any recommendation in this
14 case on the basis of the papers before you.

15 THE COURT: Well, I have seen the stenographic
16 transcript, in which he stated that probably the motion to
17 dismiss ought to be granted.

18 MR. SHELTON: I understand that, your Honor.

19 THE COURT: That is all I know.

20 MR. SHELTON: But at that point in time, there was
21 no motion to dismiss pending before him, and Magistrate
22 Schreiber never had the opportunity to look at my papers.

23 THE COURT: Well, that doesn't have anything to do
24 with whether or not I should certify it.

25 MR. SHELTON: Your Honor, I agree. I do not think

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2 there is a controlling question involved here. I think the
3 question that your Honor has decided today, the denial of a
4 motion to dismiss for lack of prosecution, is something that
5 would go to the Court of Appeals for the Second Circuit,
6 especially on an interim basis. There is no controlling
7 question here, your Honor.

8 THE COURT: Well, I don't know what the Court of
9 Appeals would view as the duty and authority of this Court as
10 an institution to get this case tried. The only reason --
11 and I have made it, I think, abundantly clear -- the only
12 reason that I don't dismiss the action for failure to
13 prosecute is that I see no machinery under our present system
14 for getting a case tried if you are the plaintiff, outside
15 of writing letters and telephoning the judge.

16 If the Court of Appeals could find that the failure
17 of the plaintiff to do anything in preparation for trial could
18 lull the defendants into positions and enable me in good con-
19 science to dismiss the case for lack of prosecution or failure
20 to prosecute, then that would materially shorten the litiga-
21 tion.

22 MR. SHELTON: Your Honor, the facts in the affidavit
23 that I have submitted to you make it crystal clear that we have
24 done a lot of work in connection with the preparing of this
25 case for trial.

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2 THE COURT: Well, I must say that I think that the
3 case has not been prepared for trial. But that is not the
4 reason. That is beside the point.

5 I am not going to permit any more discovery, but
6 why shouldn't I permit these people to get my decision re-
7 viewed in the Court of Appeals, if they can do it before the
8 11th of August?

9 MR. SHELTON: What is the controlling question that
10 is involved, your Honor? I don't see any controlling question
11 on this issue at all.

→ 12 THE COURT: Under the individual assignment system,
13 whether there is any way to dismiss a case for failure to
14 prosecute when the Judge to whom the case is assigned has
15 not scheduled it for trial.

16 MR. SHELTON: They could have raised --

17 THE COURT: Remember, I have only had this case less
18 than two weeks.

19 MR. SHELTON: And your Honor has scheduled it for
20 trial already, and we are ready to go.

21 THE COURT: Yes, but by the time I got it, it had
22 been long, long dormant.

23 MR. SHELTON: Well, that is true, your Honor.

24 THE COURT: I think I will grant the certificate.
25 It may be ineffective, because it may be that the Court of

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2 Appeals won't take it, or it may be that if they take it
3 there can't be a decision before the 11th of August. But I
4 don't know of any reason why I shouldn't permit them to do
5 it, and you can tell the learned Judges of the Court of
6 Appeals all these good reasons why you think I am right.

7 MR. SHELTON: Very well, your Honor, I would respect-
8 fully submit I don't think this is a question that should go
9 to the Second Circuit. I don't think it is that kind of an
10 issue, and I don't think that this statute was meant to serve
11 that kind --

12 THE COURT: Well, if I am wrong in my approach to
13 the problem, then certainly it will have greatly simplified
14 the matter, because we wouldn't even have a trial. I can't
15 say anything more than that.

16 Now, will counsel prepare a proper order on this
17 certification?

18 MR. BARNES: Certainly, your Honor.

19 THE COURT: And I will sign it.

20 MR. SHELTON: May I ask one thing, your Honor. I
21 don't know if your Honor, because we just brought it to your
22 Honor this morning, has had an opportunity to read our
23 answering affidavit at all, and I just wonder if the remarks
24 you have made on the record here, your Honor, are in any way
25 based on the facts that I have presented in the record.

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2 THE COURT: No. Let me read it right now.

3 (Pause.)

4 THE COURT: All right. I have read Mr. Shelton's
5 affidavit now. What do you want me to do?

6 MR. SHELTON: I just wanted to make sure that your
7 Honor had had a chance to look at it. It explains what had
8 actually occurred in the case, and I thought that might in-
9 fluence the question of whether or not this is something
10 that should be so certified.

11 THE COURT: No. I don't think after reading this
12 affidavit I will change any of the rulings or remarks that
13 I have made this afternoon.

14 MR. SHELTON: Your Honor, I suspect the way we have
15 left this now with Magistrate Schreiber, I take it that he is
16 going to formulate a pre-trial order.

17 THE COURT: I don't know.

18 MR. SHELTON: Well, that's what he told us he wanted
19 to do. Shall we follow up with Magistrate Schreiber on that?

20 THE COURT: Hasn't it been assigned to him for pre-
21 trial purposes?

22 MR. SHELTON: Yes, your Honor.

23 THE COURT: Of course.

24 MR. SHELTON: We will do that very promptly and try
25 to set a date.

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2 Now, may I ask counsel, so I will know, whether or
3 not we are going to have a jury or a non-jury trial. As I
4 understand this, your Honor, the only one who is still con-
5 sidering that question is new counsel for Parvin-Dohrmann. I
6 understand that all of the other parties have agreed to waive
7 a jury trial.

8 THE COURT: Well, obviously, I don't like to appear
9 to exert the slightest pressure on anybody to waive a jury,
10 but if you mean can you ask counsel for Argent if they have
11 reached a decision on that question, I certainly would per-
12 mit that.

13 MR. SHELTON: What I really wanted to know, your
14 Honor, is whether or not we really couldn't fix a date when
15 someone would make up their mind when we can proceed.

16 THE COURT: How about counsel for Argent Corpora-
17 tion?

18 MR. BYMAN: Your Honor, our position has not changed
19 in the last ten minutes.

20 THE COURT: I am not attempting in the slightest
21 to exert any pressure. As a matter of fact, if it goes to
22 a jury, it is a lot easier for me.

23 MR. BYMAN: Your Honor, in the last ten minutes
24 nothing has changed. I would have to consult with our client
25 before I could make that kind of a decision.

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2 THE COURT: Obviously, plaintiff's counsel wants
3 to know about it. What is a reasonable time to let him know
4 about it?

5 MR. BYMAN: Your Honor, our clients are in California.
6 We would have to get back, talk to the other attorneys in
7 this case and get a meeting together to make some sort of
8 decision, and we also have to start informing ourselves
9 about the nature of this case and find out why other defense
10 counsel have decided to waive a jury.

11 THE COURT: All I am asking you is, what is a
12 reasonable length of time?

13 MR. BYMAN: I would say two to three weeks, your
14 Honor.

15 MR. SHELTON: That is fine.

16 MR. BYMAN: Your Honor, rather than having your
17 Honor set an order for us to respond, I think it would be
18 best to have Magistrate Schreiber take care of the technical-
19 ities of that.

20 MR. BARNES: That is what I was going to suggest,
21 your Honor. Let him work this out along with any schedule.

22 MR. DUFF: Might it not be helpful --

23 THE COURT: No. I am going to direct counsel for
24 Argent to notify counsel for the plaintiff, on or before the
25 close of business on May 23rd, whether they want a jury or

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whether they demand a jury or insist on a jury or waive a jury, so that counsel for the plaintiff will know what kind of a case he's got, whether it is a jury case or non-jury case.

All right. Thank you.

MR. SHELTON: Your Honor, one other thing. I have issued subpoenas now which are returnable on the 6th, when your Honor had set this case for trial. I do not know whether I can recall them in terms of some of the people. Some of them have been served actually on the defendants themselves, Mr. Dunphy, who was served, and Jesup & Lamont.

All I would like, your Honor, because I don't want to have to re-serve these people, may I have it understood on the new trial date that these people will be here again insofar as they are under the control of these defendants?

THE COURT: Well, so far as I am concerned, you can. Does anybody have any problem with that?

MR. DUFFY: I have no problem with that as far as the clients whom I represent are concerned. There are former partners of my firm whom, while we are, of course, on speaking terms, I do not control.

MR. MEISTER: I should state for the record, to the best of my knowledge, my client and no one affiliated with it has received such a subpoena.

MR. BARNES: Your Honor, one further item of house-

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2 keeping. When we do go -- hopefully we will go to the Second
3 Circuit on this -- obviously some of the facts are going to be
4 of some importance to the Court. The record now stands with
5 an answering affidavit by Mr. Shelton, which I have just
6 read once, on the way down in the taxi. I would like the
7 opportunity to consider over the week end whether we can put
8 in a reply affidavit, not really to change your Honor's mind,
9 but simply so that we can correct some of the inaccuracies
10 in his affidavit.

11 It may be, your Honor, that we don't need an affi-
12 davit. It's the kind of thing you can just argue in your
13 brief. I just haven't had time to study it.

14 So all I can say is that Monday we will let your
15 Honor know that we are going to put in a brief affidavit or
16 not put in a brief affidavit.

17 MR. SHELTON: Counsel says they are making a motion
18 in the Court of Appeals. They will have an affidavit there.
19 So there is no need of it.

20 MR. DUFF: I don't believe there is need for a
21 reply.

22 THE COURT: All right. The fewer administrative
23 problems that I have, the better.

24 MR. SHELTON: Now, there are some people we have
25 served subpoenas on whom the defendants do not control. They

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2 will be here, if I can't head them off, on the 6th. Would
3 your Honor direct when they come that they come back on the
4 return date?

5 THE COURT: Well, will you have somebody here who
6 will bring that to my attention?

7 MR. SHELTON: Yes, your Honor. We will.

8 THE COURT: There is a limit to what I can take
9 care of.

10 MR. SHELTON: Of course, we will have someone here,
11 but I do want you to know that some of them were served up
12 in Connecticut, which is within the subpoena power of this
13 Court. I may not be able to head them off.

14 THE COURT: Well, just bring it to my attention. As
15 I said, I am in the so-called emergency part, which is
16 practically a twenty-four-hour-a-day job.

17 MR. SHELTON: They are returnable there.

18 THE COURT: I am perfectly willing to make the
19 direction, but I can't carry it in my head. Please remember
20 that.

21 MR. SHELTON: We will have someone there, your
22 Honor. Thank you very much.

23

24

25

70 Civ. 4306 (IBW)

Index No. Year 19
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES O. FINLEY, et al.,

Plaintiffs,

-against-

PARVIN/DOHRMANN COMPANY, INC.,
et al.,

Defendants.

NOTICE OF MOTION
AND AFFIDAVIT

TOWNLEY, UPDIKE, CARTER & RODGERS

Attorneys for Defendants

Office and Post Office Address, Telephone

220 East 42nd Street

Borough of Manhattan New York, N. Y. 10017

Telephone MUrray Hill 2-4567

To

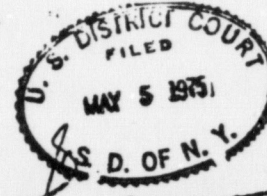
Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for



*After hearing in open Court
the within motion is denied
The reasons given in support
of the motion are as follows:
S. O. D. OF N. Y.
Mayer / USD*

May 2, 1975

MAY 8 1975
MICROFILM

NOTICE OF ENTRY

1. Please take notice that the within is a (certified)
true copy of a
document entered in the office of the clerk of the within
court and return to

and

Yours, etc.,

TOWNLEY, UPDIKE, CARTER & RODGERS

Attorneys for

Office and Post Office Address

220 East 42nd Street

Borough of Manhattan New York, N. Y. 10017

Attorney(s) for

NOTICE OF SETTLEMENT

1. Please take notice that on order

which the within is a true copy will be presented
for settlement to the Hon.

of the judges of the within named Court, at

the day of 19

M.

and

Yours, etc.,

TOWNLEY, UPDIKE, CARTER & RODGERS

Attorneys for

Office and Post Office Address

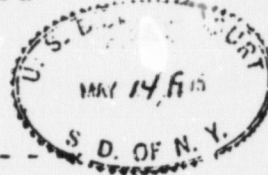
220 East 42nd Street

Borough of Manhattan New York, N. Y. 10017

Order Filed May 14, 1975 Amending May 2, 1975
 Order to Include Statement Pursuant to 28 U.S.C.
 § 1292(b) That May 2, 1975 Order Involved a
 Controlling Question of Law, etc.

L/D file	
CA 3d	5/27/75
BY	2-5

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK



CHARLES O. FINLEY, et al., :
 Plaintiffs, : 70 Civ. 4306 (IBW)
 -against- :
 PARVIN/DOHRMANN COMPANY, INC., et al., : ORDER
 Defendants. :
 -----x

Defendants having moved this Court for an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure dismissing this action with prejudice on the ground that there has been an inordinate and inexcusable failure to prosecute and that motion having been denied pursuant to an order by the Honorable Inzer B. Wyatt dated May 2, 1975 and entered May 5, 1975, and defendants having moved orally in open court on May 2, 1975 for

an Order, pursuant to 28 U.S.C.A. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, to permit application to the Court of Appeals for review;

NOW, after hearing counsel for all parties in open court on May 2, 1975, and due deliberation being had, it is

ORDERED that the May 2, 1975 order denying defendants' motion to dismiss be, and hereby is, amended to include that said order involved a controlling question of law, to wit:

Where the District Court concluded that an action should otherwise be dismissed for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, is the District Court precluded from dismissing ~~an~~ ^{as a matter of fairness} because the Individual Assignment and Calendar Rules adopted by the District Court in July, 1972 do not

~~explicitly provide for a formal notice by defendant~~ ^{any machinery by which a}

IBW plaintiff can give notice that the plaintiff is ready for trial and is asking for a trial?

COPY RECEIVED
 SHEA GOULD CLIFFORD PRAMER
 & CASSY

1975 APR 29 PM 5:14

Endorsed Order of May 2, 1975
 Denying Motion to Dismiss

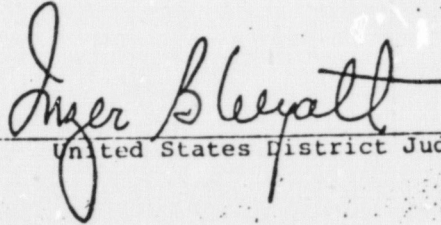
A-156

*Order Amending Order to Include Statement That Order
Involved a Controlling Question of Law*

and that there is substantial ground for difference
to said question and that an immediate appeal from
materially advance the ultimate termination of the litigation,
~~and it is~~

~~FURTHER ORDERED that the allowable time for the filing
of a petition to the Court of Appeals for permission to appeal
shall be computed from the date of the entry of this Order.~~

Dated: New York, New York
May 15, 1975


United States District Judge

COPY RECEIVED
SHEA GOULD CLIMAKO
& CASH

1975 JUN 27 PM 3:53

BY HAND ✓
BY MAIL ✓
BY ✓

COPY RECEIVED

JUN 27 1975

3:25 pm

ROSENMAN COLIN KAYE PETSCHKE FREUND & EM
ATTORNEYS FOR

COPY RECEIVED 6/27/75
4:25

TOYOTA

CARRO & LONDON

ATTY'S FOR

COPY RECEIVED
CARRO, SPANBOCK & LONDON

JUN 27 1975

ATTORNEYS FOR A.M. 7:00 P.M.
BY

copy received
Chambers of Hon.
Judge B.W. Gott.
4 Utsey, Law Clerk
6/27/75
4:50 p.m.